Supreme Court, U.S.
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No. ——

In the Supreme Court of the United States

CITY OF CUYAHOGA FALLS; MAYOR DON L. ROBART;
CITY ENGINEER GERALD DZURILLA, AND
CLERK OF COUNCIL GREGG WAGNER,
Petitioners,

v.

BUCKEYE COMMUNITY HOPE FOUNDATION;
CUYAHOGA HOUSING PARTNERS, INC.;
BUCKEYE COMMUNITY THREE L.P.; AND
FAIR HOUSING CONTACT SERVICE, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

VIRGIL ARRINGTON JR.
Counsel of Record
LAW DIRECTOR
CITY OF CUYAHOGA FALLS
2310 SECOND STREET
CUYAHOGA FALLS, OH 44221
(330) 971-8190

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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QUESTIONS PRESENTED FOR REVIEW

1. In considering a claim against a municipal corporation for intentional discrimination arising out of a facially neutral and judicially upheld referendum petition, may the court inquire into the motivations of a handful of the citizens who expressed support for the referendum and impute those motivations to the entire municipal corporation?

2. In light of the constitutional freedom of political expression, can a disparate impact claim under the Fair Housing Act be maintained against a municipal corporation for the alleged impact of the filing of a facially neutral and judicially upheld referendum petition?

3. Does the due process clause of the constitution require a municipal corporation to issue building permits when the underlying conditions for the issuance of building permits have not been met and the municipal corporation's withholding of the permits is required by the judgments of state courts of competent jurisdiction?

4. Does 28 U.S.C. 1738 require a Federal District Court to apply *res judicata* to dismiss a federal case arising out of the same factual transaction as an earlier case decided by Ohio state courts?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Petitioners

The petitioners are the City of Cuyahoga Falls, its Mayor, Don L. Robart, its former City Engineer, Gerald Dzurilla, and its former Clerk of City Council, Gregg Wagner. Petitioners were the defendants in the District Court and appellees/cross-appellants in the Court of Appeals. Since this case was filed in 1996, both Gerald Dzurilla and Gregg Wagner have left their positions with the City.

Respondents

The respondents are Buckeye Community Hope Foundation, a not-for-profit corporation that seeks to construct housing projects utilizing low-income housing tax credits, Buckeye Community Three, L.P., a limited partnership that operates the housing project in question, Cuyahoga Housing Partners, Inc., a for-profit corporation acting as the general partner of Buckeye Community Three, L.P., and the Fair Housing Contact Service, a not-for-profit housing advocacy organization. Respondents were plaintiffs in the District Court and appellants/cross-appellees in the Court of Appeals. Petitioners are unaware of any publicly held companies owning 10% or more of the stock of any of the respondent entities.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to review the judgment rendered in this case by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit Court of Appeals opinion was issued June 15, 2001, and is reported at *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 263 F.3d 627 (6th Cir. 2001) (Appendix A at 1a). The unreported decision of the District Court, per Judge Dan Polster, granting summary judgment in favor of Petitioners was rendered on November 19, 1999, and is reproduced at App. B at 35a. An earlier decision of the District Court, per Judge Sam Bell, denying summary judgment, is reported *sub nom* at 970 F.Supp. 1289 (N.D. Ohio 1997) and reproduced at App. C at 55a. A report and recommendation of Magistrate Judge James Thomas recommending dismissal on the basis of *res judicata* is reproduced at App. D at 132a. An order denying rehearing *en banc* was issued December 4, 2001, and is reproduced at App. E at 192a. In addition, because this case involves the issue of *res judicata*, the following state court decisions are reproduced in the appendix: *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 82 Ohio St.3d 539 (July 16, 1998) (App. F at 194a); *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 81 Ohio St.3d 559 (May 6, 1998) (App. G at 214a); *Buckeye Community Hope Foundation v. Cuyahoga Falls*, Summit App. No. 17933, unreported (12/11/96) (App. H at 246a) and *Buckeye Community Hope Foundation v. Cuyahoga Falls*, Summit C.P. No. CV 96-05-1701, unreported (5/31/96) (App. I at 255a.)

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appeals entered its judgment on June 15, 2001, and denied a timely filed petition for rehearing *en banc* on December 4, 2001. Petitioners invoke this Court's jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions, which are reproduced in the Appendix at App. J at 258a, et. seq.:

A. The First Amendment to the United States Constitution.

B. Section 1 of the Fourteenth Amendment to the United States Constitution.

C. 28 U.S.C. 1738.

D. 42 U.S.C. 3604.

E. Article IX, Section 2, Cuyahoga Falls Charter.

STATEMENT OF THE CASE AND FACTS

In January, 1996, Respondents (collectively referred to as "Buckeye") applied to the City of Cuyahoga Falls to construct an affordable housing project. Due to the size of the project, before building permits could be issued, a site plan had to be approved by the Cuyahoga Falls Planning Commission and City Council. Three public hearings were held and, between the three, some sixty of the City's 49,000 residents exercised their constitutional right to attend and express their opinions about the project. Some supported the project while others opposed it.

Despite any expressed opposition, however, both the Planning Commission and City Council approved the project, Council's approval being in the form of Ordinance 48-1996. The site plan approval was subject to several conditions which had to be met before building permits could issue, none of which were objectionable to Buckeye. Although Mayor Don Robart personally opposed the project, he silently approved the ordinance by not exercising his veto power. The District Court, per Judge Polster, stated that Mayor Robart voted against the project. This was an unfortunate error as, in Cuyahoga Falls, the Mayor has no vote on City Council. Rather, his role in legislation is to either approve it by signing it, or veto it. If he does neither, the ordinance is deemed approved the same as if he had signed it. Mayor Robart took this latter action, approving the ordinance by doing nothing with it.

Although Ordinance 48-1996 was passed, it did not retain emergency status, meaning it was scheduled to take effect on May 2, 1996. This would have been the earliest date the City could issue building permits to Buckeye, assuming it fulfilled all of the conditions of site plan approval — which it did not. However, on April 29, 1996, over 4,300 citizens exercised their right to petition the government by timely filing a facially neutral referendum petition seeking a popular vote on Ordinance 48-1996. Under Article IX, Section 2 of the Cuyahoga Falls Charter (App. J at 264a), the referendum petition stayed the effectiveness of Ordinance 48-1996, meaning the City could not issue building permits until the efficacy of the ordinance was resolved.

On May 1, 1996, Buckeye filed an action in the Summit County Common Pleas Court seeking to enjoin the referendum process, arguing that the referendum violated the Ohio Constitution. Specifically, the Cuyahoga Falls Charter permits referenda to review "any ordinance or resolution" and

does not distinguish between legislative and administrative actions of City Council. Article IX, Section 2, Cuyahoga Falls Charter. (App. J at 264a) By contrast, the Ohio Constitution provides for referenda to review only legislative actions. At issue in Buckeye's state court action was whether the people of home-rule chartered cities could reserve unto themselves broader referendum rights than are reserved by the Ohio Constitution.

Trial was held and, on May 31, 1996, the Common Pleas Court entered final judgment upholding the referendum and denying the request for injunctive relief. (App. I at 255a) The referendum election went forward in November, 1996, and Ordinance 48-1996 was defeated. In the meantime, Buckeye pursued appeals to the Ohio Ninth District Court of Appeals (App H at 245a) and Ohio Supreme Court, which resulted in further orders upholding the referendum petition as lawful. *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 81 Ohio St.3d 559 (May 6, 1998). (App. G at 214a) Both courts held that home-rule cities could reserve greater referendum rights than were reserved under the Ohio Constitution. Throughout this time period, the City obeyed these orders and honored the judicially upheld referendum and its preemptive effect on the City's ability to issue building permits.

Then, on July 16, 1998, the Ohio Supreme Court reconsidered its decision and reversed itself, ruling that home-rule cities are limited to the specific referendum provisions found in the Ohio Constitution. *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 82 Ohio St.3d 539, (July 16, 1998). (App. F at 194a) As before, the City obeyed this judgment and informed Buckeye that once it complied with all of the conditions of the site plan approval, the City would issue building permits. After Buckeye complied with the agreed-upon site plan conditions, the City issued building permits. The project has since been constructed.

After the Common Pleas Court entered final judgment denying injunctive relief, Buckeye filed this lawsuit in District Court, again seeking to enjoin the referendum election. Buckeye also sought damages under federal civil rights laws. Buckeye claimed that, by honoring the referendum process, the City violated the equal protection and due process clauses of the Constitution and the Fair Housing Act. 42 U.S.C. 3604, et. seq.

The City argued that the case was barred by *res judicata* in light of the judgment that had been rendered in the state case. See 28 U.S.C. 1738. The District Court referred the matter to Magistrate Judge James Thomas, who agreed with the City and recommended that the case be dismissed. (App. D at 132a) District Judge Sam H. Bell, however, disagreed and refused to dismiss the case. 970 F.Supp. 1289. (App. C at 55a) Discovery continued after which Judge Bell invited summary judgment motions on the merits of the case. As the motion pleadings were being filed, Judge Bell retired and was replaced by Judge Dan Polster, who granted the City's motion for summary judgment on the merits, without addressing the issue of *res judicata*. (App. B at 35a) Buckeye appealed to the Sixth Circuit Court of Appeals, which reversed, holding that the City could be held liable for honoring the referendum even though it was both facially neutral and upheld by three Ohio courts. (App. A at 1a) The City timely filed a motion for rehearing *en banc* which was overruled on December 4, 2001. (App. E at 192a)

REASONS FOR GRANTING THE WRIT

This case of constitutional import is one of first impression in this Court. The Sixth Circuit held that the City's honoring of a facially neutral and judicially upheld referendum petition could constitute a violation of the equal protection and due process clauses of the Constitution as well

as the Fair Housing Act. This holding is not only erroneous, but constitutionally dangerous. The threat of liability caused by the Sixth Circuit's ruling will chill the exercise of the freedom to peaceably assemble, attend public meetings, express political opinions and petition the government. It will also seriously erode any confidence parties can place in their reliance upon valid court judgments. Indeed, the Sixth Circuit's opinion places cities in the precarious position of having to choose to disobey valid state court judgments in order to avoid liability in federal court. Such is the very dilemma the doctrine of *res judicata* was intended to prevent. For this reason, federal courts are required to give full faith and credit to the judgments of state courts. 28 U.S.C. 1738.

I. The Decision of the Court of Appeals Seriously Jeopardizes the First Amendment Freedoms of Political Expression.

The Court of Appeals ruled that the City could be held liable for honoring the political acts of its citizens who pursued a referendum petition. It must be emphasized that this case does not involve the *result* of a referendum vote. Indeed, Buckeye commenced this lawsuit some four months *before* the vote took place, for it was the *filing* of the referendum petition that prevented the City from issuing building permits. Thus, the Court of Appeals held that the City could be held liable for the mere filing of a referendum petition and the expression of political views on the subject matter of that petition. This Court has never taken such an extreme position.

Quite the contrary, this Court has long recognized the need to preserve and protect the right of referendum. See, *e.g.*, *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976). In *Meyer v. Grant*, 486 U.S. 414 (1988), this Court recognized that the right of initiative — functionally the same

as referendum — involved "core political speech," and that the right to petition for political change and engage in discussions about that change "is guarded by the First Amendment." Following this guidance, the First Circuit Court of Appeals ruled that not holding a scheduled election would violate due process by disenfranchising an entire city. *Bonas v. North Smithfield*, 265 F.3d 69, 74 (1st Cir. 2001). See also *James v. Valtierra*, 402 U.S. 137 (1971), where this Court upheld a California constitutional provision that *required* a referendum on all low-income housing projects.

Similar decisions from the Ohio Supreme Court have upheld the people's right to seek and hold a referendum election even where the result of the ultimate vote may contravene the rights of others. *Jurcisin v. Cuyahoga Co. Bd. of Elections*, 35 Ohio St. 3d 137 (1988); *State ex rel. Bond v. Montgomery*, 63 Ohio App. 3d 728 (1989). In accordance with these cases, and in compliance with its charter, the City honored the referendum petition filed in this matter. The City's reverence for the referendum was reaffirmed when all three levels of Ohio courts upheld its validity under the Ohio constitution. The fact that the Ohio Supreme Court ultimately reversed itself — saying the people could not use a referendum to review an administrative act — does nothing to minimize the federal constitutional interest in preserving the right of the people to assemble, attend public meetings, express their political views, and petition the government. While not all referenda have the same legal effect, the right of the people to pursue such petitions should not be impaired by a fear of judicial reprisal. See *Meyer v. Grant*, *supra*.

It is within the context of this need to preserve the freedom of political expression that this case must be analyzed. However, the court below failed in that analysis,

and in its failure, placed in jeopardy the very constitutional rights the judiciary is duty-bound to uphold.

II. The Honoring of a Facially Neutral and Judicially Upheld Referendum Petition does not Violate the United States Constitution or the Fair Housing Act.

A. The Court of Appeals Improperly Inquired into the Motives of a Handful of Citizens to Find a Basis for Liability Against an Entire City for Alleged Intentional Discrimination.

This Court has held that an equal protection violation can be found where a government decision-maker is motivated by racial discrimination. *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977). Intentional discrimination can also violate the Fair Housing Act. *Selden Apts. v. United States Dept. of H.U.D.*, 785 F.2d 152 (6th Cir. 1986). Buckeye claimed that the City's withholding of building permits resulting from the filing of the referendum petition was motivated by an intent to racially discriminate. Yet, rather than looking to the motivations of the City's decision-maker, Buckeye focused its attack on the motives of various citizens who expressed support for the referendum. The District Court properly rejected this approach, holding in reliance upon *Arlington Heights*, that "a showing of discriminatory intent on the part of *City officials* is necessary for the Plaintiffs to prevail on their equal protection claim." (App. p. 46a) [emphasis in original] The Court of Appeals disagreed and held that the City could be held liable for intentional discrimination based on the motivations of its *citizens* as opposed to those of its government *decision-makers*. This holding is contrary to *Arlington Heights*.

In *Arlington Heights*, many citizens expressed opposition to the project at issue on arguably racial grounds. However, this Court limited its analysis to the motivations of

government decision-makers and did not examine the motives of the citizenry. This Court stated that relevant evidence of motivation may include the historical background of "official actions," or "contemporary statements by members of the *decisionmaking body*." *Arlington Heights*, *supra*, 429 U.S. at 267-268 [emphasis added]. The Court did not include in its inquiry evidence of the comments and actions of the citizenry.

Arlington Heights was followed and further explained in the Sixth Circuit case of *Arthur v. Toledo*, 782 F.2d 565 (6th Cir. 1986). In facts very similar to the instant case, the court held that, where a referendum is facially neutral, courts may not inquire into the motivations of the citizenry to find intentional discrimination. While both courts below found the instant referendum to be facially neutral, the Court of Appeals erroneously went on to require the very inquiry *Arthur* prohibits. In rejecting such an inquiry, the *Arthur* court warned at 782 F.2d 574, "Carried to its logical extreme, plaintiffs-respondents could establish a violation of the equal protection clause if one voter testified that racial considerations motivated the voter's vote * * *."

This "logical extreme" has taken firm root in the instant case under the Court of Appeals decision. The decision-makers in this case were City Council with respect to the site plan approval and the City Engineer with respect to the issuance of building permits. Thus, under *Arlington Heights* and *Arthur*, any analysis of motives must focus on the motives of City Council and the City Engineer.

Since City Council approved the site plan, its motives were of no interest to Buckeye. While Mayor Robart voiced opposition to the project, City Council rejected the Mayor's comments and approved the site plan. Furthermore, when it came to official action, the Mayor eschewed his own opposition and allowed the site-plan ordinance to be "pocket

approved" by not exercising his veto power. Thus, with respect to the approval of the site plan, all voiced opposition was rejected by the government decision-makers. Moreover, concerning the decision to withhold building permits, Buckeye never presented any evidence that the City Engineer was motivated by an intent to discriminate; rather all evidence was that he was motivated solely by the need to obey the law as that law was presented to him, first by the Law Director, and later by the Ohio courts.

Without evidence of discriminatory intent on the part of the City decision-makers, the Court of Appeals strayed from *Arlington Heights* and tried instead to divine the motives of the citizens who supported the referendum. The referendum, however, was signed by over 4,300 electors, whose identities and motives were completely undisclosed on the record. Not finding discriminatory intent among the actual referendum petitioners, the court then turned to analyze the comments of some sixty people who attended the various public hearings. While most of the comments were about perfectly valid concerns, such as the impact of the project on taxes, traffic, the schools and City infrastructure, the court found literally a handful of comments concerning safety and "downgrading" the community, and concluded that those comments veiled underlying racial discrimination. Then, the court improperly imputed those comments, first to the referendum petitioners and then to the City itself. This result is contrary to *Arlington Heights* and *Arthur* and wrongfully punishes an entire City for the political comments of a few citizens.

The court mistakenly justified its approach on the basis of *United States v. City of Birmingham*, 727 F. 2d 560 (6th Cir. 1984). In *Birmingham*, the city was faced with an unpopular housing project which drew much public comment, much of which evidenced discriminatory motives. In response to the discriminatory comments of its citizens, and "for the sole

purpose" of effectuating those comments, the city decision-makers voluntarily submitted the matter to a non-binding referendum. The referendum was the choice of the decision-makers, not the citizenry as no referendum petition was filed. In essence, the decision-makers sought to relieve themselves of the obligation to make a decision by passing the buck to the electorate. By voluntarily choosing to act to advance the discriminatory motives of the citizenry, Birmingham's decision-makers effectively adopted those motives as their own.

Such is not the case here. In this case, no one, including Buckeye and the Court of Appeals, has ever suggested that the City acted for the "sole purpose" of effectuating improper discrimination. In fact, the very opposite is the case. When members of the public expressed opposition to the project, the City decision-makers *rejected* that opposition and approved the project. In fact, each act within the City's discretion was taken *in favor* of Buckeye's project. The City withheld building permits only when its discretion was removed from it by the facially neutral and judicially upheld referendum petition. Thus, unlike *Birmingham*, the City honored the referendum because it was required to by law, not out of a discretionary and voluntary choice to effectuate unlawful discrimination.

The Court of Appeals has strayed from this Court's holding in *Arlington Heights*. It has diligently sought intentional discrimination, even to the point of seeking it in non-government decision-makers. In doing so, it threatens to hold municipalities liable for nothing more than the political speech of their citizens. The court's holding goes far beyond any legal precedent and cannot be allowed to stand.

B. The Court of Appeals Improperly Recognized a Substantive Due Process Claim in the Absence of a Legitimately Held Property Interest, a Decision that Conflicts with a Decision from the Fourth Circuit.

This Court has held that, to establish a due process violation, the plaintiff must first establish a property interest in the thing denied. *Board of Regents v. Roth*, 408 U.S. 564 (1972) Buckeye claimed that the referendum improperly denied it the benefit of a site plan approval and the resulting issuance of building permits. In agreeing with this argument, the Sixth Circuit deviated from this Court's holding in *Roth*.

Courts have repeatedly held that, as long as the governing body retains some discretion in denying the sought-after permit or approval, there can be no property interest subject to federal due process protection. *Triomphe Investors v. Northwood*, 49 F.3d 198 (6th Cir. 1995); *Gardner v. Baltimore Mayor and City Council*, 969 F.2d 63 (4th Cir. 1992).

Rather than following these cases, the Sixth Circuit weakly attempted to draw distinctions. For example, the court below stated that, in *Triomphe*, the proposed use of property did not comport with the existing zoning code, whereas in this case the site plan did. This simply is not true. *Triomphe* specifically relied upon an earlier state court finding that "all the zoning requirements set forth in the City Code were satisfied." *Id.* at 49 F.3d 198.

This is precisely the same claim made here by Buckeye, that its proposed use satisfied all of the City's zoning requirements. However, that was not enough to establish a due process property right in *Triomphe*, nor is it enough here. Buckeye must also establish that the site plan approval process itself left the City with no discretion. However, the process in Cuyahoga Falls reserves discretion to the City in

considering site plans. Cuyahoga Falls Ord. 1144.04 (App. J at 266a). That being the case, *Triomphe* requires a finding that Buckeye has no property interest in the site plan approval. To the extent that the Court of Appeals held otherwise, its decision is not only inconsistent with its earlier decision in *Triomphe*, but is also inconsistent with a similar decision from the Fourth Circuit. *Gardner v. Baltimore Mayor and City Council*, 969 F.2d 63 (4th Cir. 1992) Thus, a decision by this Court is necessary to resolve this newly created conflict among the circuits.

A due process violation also requires that the government's action be arbitrary and capricious in the strict sense, that there is no rational basis for it. *Pearson v. Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992). However, the City had the most rational of bases for honoring the referendum and withholding permits; it was required to by law. By local charter, the filing of the referendum stayed the effectiveness of the site plan approval. For over two years, this charter provision and the resulting referendum petition were judicially upheld until the Ohio Supreme Court finally overruled itself. Due process does not guarantee that a city will never make an incorrect decision that gets overturned through litigation. *Bishop v. Wood*, 426 U.S. 341, 349-350 (1976).

As the withholding of building permits was required by a judicially upheld referendum petition, there was neither a property interest in the desired permits, nor was the City's withholding of the permits arbitrary, capricious or without a rational basis. To the extent the Court of Appeals held otherwise, its decision is contrary to this Court's ruling in *Board of Regents v. Roth*, *supra*, and the circuit court decisions in *Triomphe Investors v. Northwood*, *supra*, *Gardner v. Baltimore Mayor and City Council*, *supra*, and *Pearson v. Grand Blanc*, *supra*.

C. The Court of Appeals Improperly Recognized a Disparate Impact Claim Under the Fair Housing Act for the Filing of the Referendum Petition.

Buckeye also claimed that the referendum had a disparate impact on protected classes contrary to the Fair Housing Act. This Court has never held that a disparate impact claim can be established by the impact of a facially neutral referendum. Furthermore, until this case, the Sixth Circuit had likewise refused to recognize such a claim. *Arthur v. Toledo*, *supra; Clarke v. City of Cincinnati*, 40 F.3d 807 (6th Cir. 1994). Thus, the instant decision of the Sixth Circuit plows new legal ground that improperly exalts statutory interests over greater rights guaranteed by the Constitution.

Liability under the FHA for disparate impact in the case of a referendum will all but eliminate the exercise of first amendment rights in the context of low-income housing. For this reason, *Arthur v. Toledo*, *supra*, held that, in the referendum context, mere impact alone will not support a finding of an FHA violation. *Arthur* stated at page 575, "Given the strong policy considerations underlying referendums, we fear that *recognizing a cause of action* in such instances goes far beyond the intent of Congress and could lead courts into untenable results." [emphasis added]

Given this Court's abiding respect for the referendum petition, the *Arthur* court's refusal to base an FHA disparate impact claim on the filing of a referendum petition is understandable. However, the Sixth Circuit strayed from it's earlier holding in *Arthur*, and found in the instant case that the mere filing of a facially neutral referendum petition could indeed be the basis of a disparate impact claim under the Fair Housing Act.

The court below justified its holding on what it believed to be "highly unusual circumstances." Yet, the circumstances

of this case are no more unusual than those found in *Arthur*. For example, the Court of Appeals found it highly unusual that this was the first referendum in the City concerning low-income housing. Using circular reasoning, the court found that this referendum could be illegal under the FHA because the City never before violated the law by filing a similar referendum. Conversely, under the court's logic, if this were but one of many referenda concerning low-income housing, then it would not be highly unusual and, therefore, not the basis of FHA liability.

The Sixth Circuit also found it highly unusual that the Ohio Supreme Court ultimately found the referendum to be beyond the scope of the Ohio Constitution. However, that finding cannot be viewed apart from its placement in time. Before overruling the referendum, the Supreme Court *affirmed* the findings of the lower courts upholding it. As long as those decisions remained intact from May, 1996, until July, 1998, the City was bound to obey them and it cannot be said to be highly unusual that it would do so.

The Court of Appeals' torturous attempt to find an exception to *Arthur* only underscores *Arthur's* concern about courts reaching untenable results. In holding as it did, the Court of Appeals has exalted the FHA over the first amendment and that, by itself, creates the climate for untenable results. Nothing can be more untenable than punishing a City because its citizens petitioned their local government or because the City officials had the audacity to actually obey valid court decisions upholding the validity of the petition. Accordingly, it is imperative that this Court reaffirm the wisdom of *Arthur* that a facially neutral — and, in this case, judicially upheld — referendum petition cannot be the basis of a disparate impact claim under the FHA.

III. 28 U.S.C. 1738 and *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75 (1984), Require that this Federal Litigation be Dismissed on the Basis of *Res Judicata*.

Federal courts are required to give full faith and credit to the judgments of state courts. 28 U.S.C. 1738. (App. J at 258a) Applying the doctrine of *res judicata*, final judgments from state courts are entitled to the same preclusive effect in federal courts as they have in their home states. *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75 (1984).

Under Ohio law, a final judgment in an action "bars *all* subsequent actions based upon *any claim* arising out of the transaction or occurrence that was the subject matter of the previous action * * * " *Grava v. Parkman Township*, 73 Ohio St. 3d 379 (1995), Syl. [emphasis added] Magistrate Judge James Thomas followed this holding in recommending dismissal. Judge Bell disagreed and, in doing so, created an exception to *res judicata* that does not exist in Ohio law. Judge Bell's was the last analysis of *res judicata* in this case; Judge Polster did not address it in granting summary judgment and the Court of Appeals simply deferred to Judge Bell's opinion.

The holding in *Grava* cited above is based on the Restatement of Judgments 2d, Sections 24-25, which apply the transactional view of *res judicata*. Under that view, all actions arising out of a single factual transaction must be brought at the same time or forever be barred. *Res judicata* applies even where the plaintiff seeks a different remedy in the second case than was sought in the first action. *Grava*, *supra*. Magistrate Judge Thomas set forth very clearly that both the state and federal lawsuits arose out of the same transaction — see App. D at 186a-190a — and neither

Buckeye nor Judge Bell seriously contended this point. Thus, *Grava* would require dismissal of this case.

Section 33 of the Restatement, however provides an exception to *res judicata*. Under Comment c of that section, *res judicata* does not bar a second lawsuit where the first lawsuit sought *solely* a declaratory judgment. The Ohio Supreme Court has never addressed or adopted this provision of the Restatement, although it was applied in one case from an Ohio appellate court predating *Grava*. *Jamestown Village Condo. Owners Assoc. v. Market Media Research*, 96 Ohio App. 3d 678 (1994).[1] While the *Jamestown* court applied the declaratory judgment exception, it emphasized at page 687 that the initial lawsuit sought "a declaratory judgment — nothing more."

The seeking of any form of coercive relief in the first case, such as an injunction, destroys the exception to *res judicata*. See *Mandarino v. Pollard*, 718 F.2d 845 (7th Cir. 1983); *Minneapolis Auto Parts Co. v. Minneapolis*, 739 F.2d 408 (8th Cir. 1984); *Cimasi v. Fenton*, 838 F.2d 299 (8th Cir. 1988); *Smith v. Chicago*, 820 F.2d 916 (7th Cir. 1987). In fact, one of the cases relied upon in *Jamestown* held, "However, a plaintiff who brings an action for both declaratory and coercive relief is thereafter barred from bringing a suit for further coercive relief, *either legal or equitable*, based upon the same cause of action." *Radkey v. Confalone*, 133 N.H. 294 (1990). [emphasis added]

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[1] A second case discussed the declaratory judgment exception. *Ketchel v. Bainbridge Twp.*, 79 Ohio App. 3d 174 (1992). This case, however, is of no precedential value as the court affirmed the dismissal of the case due to an insufficient record. Any discussion of *res judicata* is, therefore, *dictum*.

Nothing in Ohio law permits a plaintiff to bring successive actions for coercive relief, including injunctive relief, arising out of a single transaction. Buckeye's state law action sought both declaratory and coercive relief. Thus, even under the *res judicata* exception found in *Jamestown*, Buckeye's second action would be barred under Ohio law. That being the case, it is barred in federal court. 17 U.S.C. 1738; *Migra v. Warren City School Dist. Bd. of Education*, *supra*.

Judge Bell, and hence the Court of Appeals, erred in not applying Ohio law to this case. Rather, Judge Bell attempted to minimize Buckeye's request for injunctive relief in the state courts saying that it was only incidental to the paramount request for declaratory relief.

However, it is apparent that Buckeye's state case was, first and foremost, one for injunctive relief. The Common Pleas Court began its decision by saying, "This cause came on before this Court on the 15th day of May, 1996, *for preliminary and permanent injunction* * * * " and ended by saying, "For all of the above reasons, the Motion for Preliminary or Permanent Injunction of the Plaintiffs [Buckeye] is hereby denied." (App. I pp. 255a, 257a) [emphasis added] Likewise, the state Court of Appeals opened its opinion with the words, "Appellant Buckeye Community Hope Foundation appeals the decision of the Summit County Court of Common Pleas denying *preliminary and permanent injunctive relief*" and ended with "The decision of the trial court denying *preliminary and permanent injunctive* relief is affirmed." (App. H pp. 247a, 253a) [emphasis added] Clearly, Buckeye's request for injunctive relief was not merely incidental to its request for declaratory relief. Rather, the request for injunctive relief was the heart of Buckeye's case.

Under any reading of Ohio *res judicata* law, a second lawsuit is barred where the first lawsuit sought coercive relief in the form of an injunction. *Grava v. Parkman Township*, *supra*; *Jamestown Village Condo. Owners Assoc. v. Market Media Research*, *supra*. The fact that Buckeye also happened to seek a declaratory judgment does not remove this case from the Ohio law dealing with *res judicata*. Otherwise, plaintiffs could always avoid *res judicata* by simply adding a count to their complaint seeking a declaratory judgment. Such is not the law of Ohio.

The doctrine of *res judicata* is crucial to this case because the state courts repeatedly upheld the validity of the referendum that preempted the City's ability to issue building permits. Now, Buckeye wants to hold the City liable in damages for obeying the very court orders Buckeye sought in the first place. The doctrine of *res judicata* was intended to prevent this injustice and 28 U.S.C. 1738 was intended to preserve the validity of state court judgments in federal courts. By not applying *res judicata*, the Court of Appeals failed to follow 28 U.S.C. 1738 and *Migra v. Warren City School Dist. Bd. of Education*, *supra*.

CONCLUSION

The City harbors no illusions about this being an easy case; it is not. The City's appendix consists mainly of eight separate and conflicting opinions that have been rendered by the state and federal courts in litigation arising out of this matter. Seventeen different judicial officers have considered this litigation in state and federal courts. Collectively, ten of them have joined together in five opinions in the City's favor; eight of them have joined in three opinions in favor of Buckeye. Clearly, this is not an easy case and this Court's attention is required to preserve constitutional rights.

The adage, "hard cases make bad law," has, unfortunately found a home in the decision of the Court of Appeals. The law announced by the Sixth Circuit is bad. In its zeal to protect the statutory interests of a property owner, the Sixth Circuit has overlooked even greater constitutional rights, the right of citizens to assemble, to speak, to petition the government, and to vote.

The Court of Appeals in the earlier case of *Arthur v. Toledo*, *supra*, expressed concern over the possibility of "untenable results" in cases involving referenda. This case is the fulfillment of that concern. The decision of the court below threatens the following "untenable results:"

1. The freedom of speech will no longer apply to criticism of low- income housing as any such criticism will be viewed as veiled racial bigotry.

2. City councils will need to silence citizens who wish to express unsavory opinions, because any official action taken that is consistent with the voiced opinions of even a handful of citizens will be subject to liability even if the city's actions were taken in obedience to valid court judgments.

3. Any referendum petition will be subject to the scrutiny of the motives of each and every person circulating, signing, or merely speaking in support of the referendum.

4. Innocently motivated petitioners will need to fear that another person with not so innocent motives will subject their entire city to liability.

5. Plaintiffs will be able to obtain multiple bites at the judicial apple, even obtaining inconsistent results and holding the defendants liable for obeying those inconsistent results.

If the City can be held liable in this case, it will not be because it honored a facially neutral referendum; so much

was required of it by three state court decisions. It will also not be because it gave effect to the discriminatory motives of its citizenry as it exercised all discretion it had in opposition to any such motives.

Rather, any finding against the City will be because a handful of citizens exercised their first amendment right to express their political opposition to low-income housing, even though the City rejected such opposition, approved the project, and honored a referendum in obedience to court judgments upholding its validity. Liability under such circumstances simply cannot be permitted in a constitutional republic. The first amendment cries out for this Court to grant the writ of certiorari and the City respectfully so requests.

Respectfully submitted,

Virgil Arrington Jr.
Law Director
City of Cuyahoga Falls
2310 Second Street
Cuyahoga Falls, Ohio 44221
(330) 971-8190

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 99-4555; 00-3052

Buckeye Community Hope Foundation, et al., *Plaintiffs-Appellants/Cross-Appellees*,	)
v.	)
City of Cuyahoga Falls, et al., *Defendants-Appellees/Cross-Appellants*.	)

Appeal from the United States District Court
for the Northern District of Ohio at Akron.
No. 96-01458--Dan A. Polster, District Judge.
Argued: June 15, 2001
Decided and Filed: August 31, 2001
Before: JONES, DAUGHTREY, and COLE, Circuit Judges.

COUNSEL

ARGUED: Edward G. Kramer, KRAMER & ASSOCIATES, Cleveland, Ohio, for Appellants. Virgil E. Arrington, LAW DIRECTOR, CITY OF CUYAHOGA FALLS, Cuyahoga Falls, Ohio, for Appellees.

ON BRIEF: Edward G. Kramer, KRAMER & ASSOCIATES, Cleveland, Ohio, Diane E. Citrino, FAIR HOUSING LAW CLINIC, Cleveland, Ohio, for Appellants. Virgil E. Arrington, LAW DIRECTOR, CITY OF CUYAHOGA FALLS, Cuyahoga Falls, Ohio, for Appellees.

OPINION

NATHANIEL R. JONES, Circuit Judge. This case involves a federal civil rights suit brought by Plaintiffs-Appellants, Buckeye Community Hope Foundation, et al., against the Defendants-Appellees, the City of Cuyahoga Falls ("City"), et al., alleging that the City's decision to allow a referendum to stay the effectiveness of Appellants' lawfully approved site plan violated their constitutional and statutory rights. Appellants appeal the district court's grant of summary judgment which dismissed their equal protection, substantive due process, and Fair Housing Act claims. Because there are genuine issues of material fact with regard to all three claims, we **REVERSE** the lower court's grant of summary judgment.

I. BACKGROUND [1]

Plaintiff, the Buckeye Community Hope Foundation ("Foundation"), is a not-for profit 501(c)(3) corporation. It

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[1] These facts are derived primarily but not exclusively from Judge Bell's opinion below. *See Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 970 F. Supp.1289 (N.D. Ohio 1997).

has as its purpose the development of affordable housing through the use of low-income housing tax credits. For each project, a separate limited partnership is formed as the investment vehicle to sell the tax credits. In this case, the specific limited partnership is plaintiff, Buckeye Three Limited. The limited partnership is the owner of the land, and once it is completed, the development. To protect each development and its investors, the Foundation forms a separate corporation to act as the general partner for the limited partner. In this case, plaintiff Cuyahoga Partners, Inc., a for-profit corporation, was formed to serve as the general partner of Buckeye Three Limited. Steven Boone is the president of Cuyahoga Partners, Inc.

Mr. Boone contacted the Mayor of the City of Cuyahoga Falls, Don Robart, in the summer of 1995 about the possibility of developing a low-income housing complex in Cuyahoga Falls. According to Mr. Boone, the Mayor expressed no problems about the proposed development at that time.

On June 12, 1995, the Foundation purchased the real property located on Pleasant Meadow Boulevard. On February 21, 1996, the "site plan" for the property was submitted for approval at a meeting of the Planning Commission for Cuyahoga Falls. Members of the public attended this meeting and raised several questions about the project. Some of the citizens expressed concern about the impact that the project would have on their neighborhood. For example, Lee Minier, a lifelong resident of Cuyahoga Falls, expressed concerns about safety and stated "they know what kind of element is going to move in there." Joint Appendix ("J.A.") at 154. Another resident stated that "[t]here will be a different class of people living there." *Id.* In connection

with the Planning Commission's meeting, Cuyahoga Planning Director, Louis Sharpe, prepared a Staff Summary of the site plan. This summary recommended approval of the site plan subject to approximately nine conditions agreed to by Mr. Boone. One of the conditions required the developers to erect a fence on one side of the property before the building permit for the apartment complex could issue.

Notwithstanding the aforementioned opposition of various citizens, the site plan, including the conditions, was unanimously approved by the Planning Commission at the February 21, 1996 meeting. The Planning Commission's recommendation then had to be submitted to and approved by the City Council. Mayor Robart did not attend the February 21, 1996 Planning Commission meeting.

On March 4, 1996, the Planning Commission's recommendation on the site plan was addressed at a City Council meeting attended by Mayor Robart. At this meeting, members of the public again voiced their concerns about the project. Ann Bridges expressed concern about the extra crime and drugs that come with low-income housing. J.A. at 961. Mayor Roberts voiced his opposition to the project. The Mayor referred to an article entitled "Stuck in the Ghetto" which discussed the various problems associated with Section 8 housing (the project at issue does not involve Section 8 vouchers). J.A. at 966.

Another City Council meeting was held on March 18, 1996. Once again, members of the public expressed their opposition to the project. One resident of Cuyahoga Falls objected to the project on the ground that "[t]here will be . . . kids running around in our yards." J.A. at 949. Mayor Robart, in a lengthy statement, once again voiced his

opposition. The Mayor stated that the issue was not whether the project was properly zoned, but rather the issue was low-income housing. The Mayor noted that "people who spent a lot of money on their condominiums simply don't want people moving in their neighborhood that are going to be renting for $371." J.A. at 945. Another Council meeting occurred on April 1, 1996, and the site plan was approved by a vote of six to three with two abstentions. The City Council's approval was expressed in the form of Ordinance No. 48-1996.

Parallel to the site approval process, a referendum effort was proceeding. On April 9, 1996, the "Citizens for the Preservation of Voter Rights" convened a meeting to discuss "taking the ISSUE OF A 72 UNIT HOUSING DEVELOPMENT ON PLEASANT MEADOW BLVD. to the vote of the people of Cuyahoga Falls in November." The Mayor spoke at the meeting and stated that he supported the referendum effort. Lee Minier testified that no City of Cuyahoga Falls officials were asked to sign the referendum petitions. On or about April 29, 1996, a referendum petition was submitted to the Clerk of City Council, Gregg Wagner. The Board of Elections approved the referendum petition on May 1, 1996.

On May 1, 1996, plaintiffs filed a state action in the commons pleas court of Summit County to enjoin the referendum process under Ohio law. The plaintiffs sought injunctive relief and a declaration that the ordinance could not be challenged by referendum because its passage by City Council was an administrative, rather than a legislative action. Plaintiffs claimed that Article II, Section 1f of the Ohio Constitution did not grant powers of referendum to citizens of municipalities on administrative actions taken by municipal legislative bodies. On May 15, 1996, the state trial court

conducted a hearing on plaintiffs' request for preliminary injunction. On May 31, 1996, the court denied the plaintiffs' motion for preliminary or permanent injunction. The court found that the Charter of Cuyahoga Falls permitted the residents of Cuyahoga to exercise powers of referendum on any action by City Council, regardless of whether the action taken was legislative or administrative in nature. Plaintiffs appealed the decision of the trial court to the court of appeals for Summit County. The court of appeals affirmed the judgment of the trial court, holding that Article II, Section 1f of the Ohio Constitution does not limit the referendum powers of charter municipalities such as Cuyahoga Falls. The Ohio Supreme Court affirmed the judgment of the court of appeals.

On June 20, 1996, Gilbertson Barno, the Executive Director of the Foundation, wrote to the City of Cuyahoga Falls seeking the issuance of a building permit. On June 26, 1996, Gerald Dzurilla, the City Engineer for Cuyahoga Falls, sent a letter to Barno indicating that he could not issue the building permit in light of the pending referendum.

Plaintiffs filed the present federal action on July 5, 1996. In contrast to the complaint filed in state court, the complaint filed in federal court was based on federal law. The plaintiffs alleged violations of the Fair Housing Act, 42 U.S.C. §§ 3601 et seq., 42 U.S.C. §§ 1981 and 1982, the Due Process Clause of the Fourteenth Amendment via 42 U.S.C. § 1983, and the Equal Protection Clause of the Fourteenth Amendment via 42 U.S.C. § 1983. Plaintiffs sought injunctive relief and damages. Defendants brought a motion for summary judgment seeking to dismiss all of plaintiffs' claims. On November 19-21, 1996, Judge Sam H. Bell conducted a hearing and heard evidence regarding plaintiffs'

request for a preliminary injunction. Ultimately, the court approved an injunction stipulated to by the parties which enjoined the Summit County Board of Elections from certifying the results of a referendum concerning plaintiffs' ability to build low-income housing on land in Cuyahoga Falls. However, because the lower court found that plaintiffs failed to prove irreparable harm, their request for an injunction ordering the City of Cuyahoga Falls to issue a building permit was denied. In the order denying plaintiffs' preliminary injunction request, Judge Bell deferred consideration of the merits of the underlying causes of action, concluding that such consideration would be more appropriately addressed after evaluation of defendants' motions for summary judgment. Judge Bell then referred those motions to Magistrate Judge James D. Thomas for a report and recommendation. Judge Thomas recommended that defendants' motions for summary judgment be granted.

Judge Bell ultimately disagreed with the magistrate's recommendation. Judge Bell noted that in order to understand plaintiffs' federal claims it is important to understand the procedural context in which the referendum arose:

> The Cuyahoga Falls City Council approved the ordinance which embodied [p]laintiffs' site plan on April 1, 1996. The Mayor did not sign the ordinance, but according to City Charter Article 2, Section 5, if the mayor does not act upon the ordinance within ten days then the ordinance shall take effect in the same manner as if he had signed it, what this court will refer to as "pocket approval." So ten days after its passage by the Council, the ordinance was pocket approved by the Mayor. As of this stage there was no evidence that the City [d]efendants did anything to

give effect to the citizen's [sic] petition.

. . . .

[T]he ordinance was to take effect "as provided by law". . . . Ohio Revised Code Section 705.16 provides that "All ordinances or resolutions shall be in effect after thirty days from the date of their passage . . . ." Section 1.14 of the Ohio Revised Code tells us that when counting thirty days, the first day is excluded and the last day included. . . . [T]he ordinance was to take effect . . . on May 2, 1996.

. . . .

The City Charter states that within 30 days after the Council passes an ordinance, citizens of the city may file a petition signed by at least ten percent of the electors requesting that such ordinance be repealed or submitted to the voters as a referendum. (Charter Art. IX, § 2.) Such a petition was filed in this case on or about April 29,1996. If the ordinance so challenged is not repealed by the Council within 30 days, the ordinance is to be submitted to a vote of the people. The ordinance itself cannot "go into effect until approved by a majority" of the electorate. (Charter Art. IX, § 2.)

. . . .

It is axiomatic that in order for an ordinance to "go into effect" it cannot already be in effect. . . . [T]he court must conclude that the ordinance has never gone into effect. At some moment in time after the filing of the petition and before the ordinance was to take effect on May 2, the effectiveness of the ordinance was

stayed.

See Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls, 970 F. Supp. 1289, 1307-08 (N.D. Ohio 1997).

Judge Bell further noted that upon the filing of the petition, City Engineer Dzurillla sought advice from the City Law Director concerning the effect of the petition on his authority to issue building permits for the property identified in the ordinance. On April 30, 1996, Dzurilla received a response indicating that building permits for the construction of the apartment complex could not be issued because the site plan ordinance "does not take effect" due to the petitions. *Id.* at 1308. Judge Bell concluded that "practically as well as theoretically speaking, the [p]laintiffs were unable to secure the benefit of their otherwise lawfully approved site plan on the date that the site plan was to take effect, May 2, 1996." *Id.*

After extensive legal analysis, Judge Bell concluded that there were genuine issues of material fact precluding summary judgment with respect to plaintiffs' race-based equal protection, Fair Housing Act, and substantive due process claims. *Id.* at 1316, 1318, 1320.

On May 6, 1998, the Ohio Supreme Court, upon a motion for reconsideration filed by the plaintiffs, again ruled on the issue of whether the defendants use of a referendum to reject plaintiffs' site plan violated the Ohio Constitution. The City Charter of Cuyahoga Falls provides that voters may exercise powers of referendum on any ordinance passed by the City Council. J.A. at 129. However, Article II, Section 1f of the Ohio Constitution provides that "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may

now or hereafter be authorized by law to control by *legislative* action . . . ." Ohio Const. art. II, § 1f. (emphasis added). The Ohio Supreme Court held that the action taken by the Cuyahoga City Council was clearly administrative and not legislative in nature since it merely approved the Planning Commission's application of existing zoning regulations to plaintiffs' site plan. *See Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 697 N.E. 3d 181, 186 (Ohio 1998). Accordingly, the Ohio Supreme Court found that the referendum as applied to the ordinance approving the plaintiffs' site plan violated Ohio's constitution. *Id.*

Subsequent to the Ohio Supreme Court's decision, defendants again filed motions for summary judgment in federal court. The case was reassigned to Judge Dan Polster on September 8, 1998, after Judge Bell's retirement. On November 29, 1999, Judge Polster issued an order granting the defendants' motions for summary judgment and dismissed plaintiffs' equal protection, Fair Housing Act, and substantive due process claims.

II. LEGAL ANALYSIS

A. Standard of Review

This Court reviews a district court's order granting summary judgment *de novo*. *See Richardson v. Township of Brady*, 218 F.3d 508, 512 (6th Cir. 2000). Summary judgment is appropriate if a party who has the burden of proof at trial fails to make a showing sufficient to establish the existence of an element that is essential to that party's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed. 2d 265 (1986). On appeal, we must construe the evidence, and all inferences to be drawn from it, in the light most favorable to the nonmoving party. *See*

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed. 2d 538 (1986).

B. Equal Protection

Plaintiffs argue that defendants violated the Equal Protection Clause of the Fourteenth Amendment when they improperly gave effect to the racial bias of their citizens by allowing a referendum to stay the effectiveness of plaintiffs' City Council-approved site plan. Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. *See Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265, 97 S. Ct. 555, 563, 50 L. Ed. 2d 450 (1977). Plaintiffs do not have to show that the challenged action rested solely on racially discriminatory purposes. As the Supreme Court stated in *Arlington*:

> Rarely can it be said that a legislative or administrative body operating under a broad mandate made a decision motivated *solely* by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been a *motivating factor* in the decision, this judicial deference is no longer justified.
>
> *Id.* (emphasis added).

Determining whether invidious discriminatory purpose was a motivating factor "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Vill. of Arlington Heights*, 429 U.S. at 266, 97 S.Ct. at 564; *see also Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982) ("Municipal officials acting in their official capacity seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority."); *Dailey v. City of Lawton*, 425 F.2d 1037, 1039 (10th Cir. 1970) ("If proof of a civil rights violation depends on an open statement by an official of an intent to discriminate, the Fourteenth Amendment offers little solace to those seeking its protection."). Rather than engaging in such a sensitive factual inquiry, Judge Polster held that the defendants did not exhibit racial bias in denying plaintiffs the benefit of the City Council-approved site plan and withholding the building permits because the defendants were simply following the City Charter which required them to stay the effectiveness of any ordinance that is subject to a referendum. J.A at 65-66. This analysis begs the question of whether the public opposition to the housing project was animated by racial bias and whether City officials improperly gave effect to that racial bias by allowing the fate of the project to be decided by referendum.

"The Supreme Court has long held, in a variety of circumstances, that a governmental body may not escape liability under the Equal Protection Clause merely because its discriminatory action was undertaken in response to the desires of a majority of its citizens." *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1131, 1224 (2d Cir. 1987). In *Hunter v. Erickson*, the Supreme Court held that the implementation

of the majority will through referendum is not immune from judicial scrutiny since the "sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed." 393 U.S. 385, 392, 89 S.Ct. 557, 561, 21 L.Ed. 2d 616, 623 (1969); *see also City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448, 105 S.Ct. 3249, 3259, 87 L.Ed. 2d 313, 326 (1985) ("It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause . . . ."). Thus, if there is evidence that residents of Cuyahoga Falls were motivated, in part, by racial bias, the City can not give effect to that bias simply because its City Charter provides for referendum. *See Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S.Ct. 1879, 1882, 80 L.Ed. 2d 421, 426 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *Dailey*, 425 F.2d at 1039 ("[I]t is enough for the complaining parties to show that the local officials are effectuating the discriminatory designs of private individuals."). So, the question here is whether the plaintiffs produced sufficient evidence to raise a genuine issue of material fact as to whether the City officials gave effect to a referendum that was motivated, in part, by racial bias.

The Supreme Court in *Arlington Heights* articulated a multi-factored test for determining whether official action was motivated by discriminatory intent. Those factors include: (1) the racial impact of the decision; (2) the historical background of the decision, particularly where it reveals a series of official actions taken for invidious purposes; (3) the specific sequence of events leading up to the challenged decision--including departures from the normal procedural sequence; and (4) the legislative or administrative history--especially

where there are contemporary statements by members of the decisionmaking body, or minutes of its meetings. 429 U.S. at 266-68, 99 S.Ct. at 564-65.

With regard to the first prong--the racial impact of the challenged decision--Judge Polster acknowledged that the staying of the site plan ordinance disproportionately impacted African-Americans. J.A. at 68 ("There is no doubt that the repeal of the Ordinance approving development of a low income housing site had a disparate impact on racial minorities . . . ."). Plaintiffs' expert witness testified that if the 72 unit housing complex were not built, there would be a disproportionate impact on the black population with children since black income eligible households comprise a disproportionately high percentage of the multi-bedroom rental housing market. J.A. at 1309. The second prong--a history of discriminatory actions taken by the state-- is not a factor that cuts either way in this instance.

The third prong--departures from the normal procedural sequence--provides circumstantial evidence of racial discrimination. At the February 21, 1996 Planning Commission meeting, where members of the public voiced their strong opposition to the low-income housing project, Mrs. Hummel, a member of the Commission, remarked that she does not recall any other project where "there was this much scrutiny of a site plan." J.A. at 158. Louis Sharpe testified that there never has been an apartment complex in Cuyahoga Falls' history where a site plan had to face a referendum process except in the plaintiffs' case. J.A. at 1277. The Fourth Circuit in *Smith v. Town of Clarkton*, faced with a similar scenario, stated that "we view as significant the 'opinion poll,' conducted for the first time in the history of the small town of Clarkton immediately after expressions of

racial opposition to the building of housing units surfaced. Such deviations from the procedural norm by governmental decisionmakers in such circumstances are suspect when they lead to results impacting more harshly on one race than on another." 682 F.2d at 1066. Similarly, in the case at bar, the fact that, prior to plaintiffs' project, the City of Cuyahoga Falls had *never* submitted a site plan to a referendum raises a genuine issue of material fact as to whether this deviation from the procedural norm was predicated on racial bias, especially in light of the disproportionate impact the decision had on blacks.

The fourth prong--the administrative history of the decision--also provides circumstantial evidence of racial bias. An examination of the record reveals that a jury could reasonably conclude that public opposition to the plaintiffs' project had a decidedly racial component. At the February 2, 1999 meeting of the Cuyahoga Planning Commission, Lee Minier expressed concerns about safety, commenting that "they know what kind of element is going to move in there." J.A. at 154. Gerry Priobonic, another resident, noted that "there will be a different class of people living there." *Id.* Harry Bridges expressed concerns about safety. *Id.* Susan Brady stated that she does not believe the area will be safe. According to her, "Cuyahoga Falls is downgrading itself." J.A. at 156. Several members of the public questioned Planning Director Sharpe about the height of a fence serving as a buffer between the project and neighboring complexes. Sharpe stated that the fence should not be higher than five feet, having to remind the citizens that the developer is trying to create a residential atmosphere not an institutional one. J.A. at 157. At the March 4, 1996 meeting of the City Council, Amy Bridges expressed concern about the extra

crime and drugs that come with low-income housing. J.A. at 961.

Mayor Robart also voiced his opposition to the project. The Mayor seconded the concerns of those opposing the project, referring in his remarks to the crime problems associated with low- income housing projects. J.A. at 966. The Mayor also linked the project to the same type of "social engineering that brought us busing," which the Mayor considered to be an utter failure. *Id.* Further casting the debate over the project in a racial light, the Mayor referred to an article entitled "Stuck in the Ghetto" which discussed the problems with Section 8 housing. *Id.* Notably, the project at issue does not involve Section 8 vouchers; residents would have to pay the full rent. In any case, the Mayor declared that Cuyahoga Falls has done its part in supporting such projects. At the March 18, 1996 City Council meeting, Mayor Robart forthrightly acknowledged that the issue was not whether the project was properly zoned, but rather the issue was low-income housing. J.A. at 945. The Mayor stated "that people who spent a lot of money on their condominiums don't want people moving in their neighborhood that are going to be renting for $371." *Id.* Thus, the Mayor stated that City Council should not advocate anything that is clearly a step backwards and concluded that "we have to oppose this and we have to oppose it with vigor." *Id.*

Although a number of these statements could be interpreted as opposition to the lower economic status of the potential residents of the project, when viewed in the light most favorable to the plaintiffs, these statements can just as easily be seen as expressions of racial bias against blacks, especially given the fact that racial stereotypes prevalent in our society associate blacks with crime, drugs, and lower

class status. *See* David Cole, No Equal Justice: Race and Class in the American Criminal Justice System 34, 42 (1999) ("[T]he correlation of race and crime remains a stereotype, and most blacks will not conform to the stereotype. Even though blacks are arrested and convicted for a disproportionate amount of violent crime, it is nonetheless true that in any given year only about 2 percent of black citizens are arrested for committing any crime; the vast majority, or 98 percent, of black citizens are not even charged with crime."); Michael Sunnafrank & Norman E. Fontes, *General and Crime Related Racial Stereotypes and Influence on Juridic Decisions*, 17 Cornell J. Soc. Rel. 1, 10 (1983) (finding strong evidence in a sample of college students of crime- related racial stereotyping, such as perceiving blacks as more likely than whites to commit assault, and other violent crimes). Viewed in the light most favorable to plaintiffs, many of the statements made by Cuyahoga residents evidence a racial bias toward the prospect of a significant number of blacks moving into their community which is 98% white.

At bottom, the circumstances surrounding the opposition to the project, including the comments mentioned above, at least, raise a genuine issue of material fact as to whether the City, in rejecting the ordinance which approved the site plan, gave effect to the racial bias of its citizens.

Judge Polster's refusal to view the evidence contextually through an examination of the factors articulated in *Arlington Heights* stems from his application of the Sixth Circuit's decision in *Arthur v. City of Toledo*, 782 F.2d 565 (6th Cir. 1986). In *Arthur*, this court held that "absent a referendum that facially discriminates racially, or one where although facially neutral, the only possible rationale is racially

motivated, a district court cannot inquire into the electorate's motivations in an equal protection clause context." *Id.* at 574. [2] It is undisputed that the referendum in this case was facially

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[2] Although we are bound by the Sixth Circuit's decision in *Arthur v. City of Toledo*, 782 F.2d 565 (6th Cir. 1986), it is by no means immune from our critique. The Court in *Arthur* relied on the Supreme Court's decision in *Washington v. Seattle School District No. 1*, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed. 2d 896 (1982) in fashioning its unique test for evaluating equal protection challenges to referendums. 782 F.2d at 572 (6th Cir. 1986). An examination of the Supreme Court's decision in *Washington* reveals that its invalidation of an initiative that forbade busing for desegregation purposes would have failed *Arthur's* stringent test. The Sixth Circuit in *Arthur* stated that the only instance when a plaintiff may bring an equal protection challenge to a facially neutral referendum is when the "only possible rationale" animating the citizen's petition is racial bias.782 F.2d at 574. However, in *Washington*, although the Supreme Court acknowledged "that voters were moved to support [the initiative] for 'a number of reasons,' so that 'it is impossible to ascertain all of those reasons or to determine the relative impact of those reasons upon the electorate'" the Court, based on its finding that the facially neutral initiative was effectively drawn for racial purposes, invalidated the initiative. *Washington*, 458 U.S. at 465, 102 S.Ct. at 3192. Aside from contravening Supreme Court caselaw, the decision in *Arthur* also suffers from the following flaw: It eviscerates the use of the Equal Protection Clause of the Fourteenth Amendment in the context of challenging referendums. A plaintiff will almost never be able to prove that racial bias was the "only possible motivation" behind a referendum that otherwise furthers racial discrimination. Moreover, if 95% of the proponents of a hypothetical referendum were motivated by racial bias, the rule in *Arthur* would nonetheless require courts to give effect to the overt racial prejudice of the majority.

neutral and that there were other hypothetical justifications for the referendum apart from racial bias. However, the district court's reliance on *Arthur* is misplaced. To be precise, *Arthur's* holding is based on its conclusion that the *Arlington Height*'s "motivating factor" test does not apply to equal protection *challenges* to referendum elections. *Id.*[3] Thus, *Arthur's* holding is limited to equal protection challenges to referendum elections. In the case at bar, the plaintiffs are not challenging the referendum nor are they seeking to overturn the result of that referendum. [4] Rather, the plaintiffs seek to show that the defendants violated the Equal Protection Clause of the Fourteenth Amendment by giving effect to the racially biased opposition to their project. As Judge Bell pointed out in his opinion below:

> [T]he Court sees a distinction between inquiring into the thoughts of the voter at the voting box, and recognizing the stated motivations of citizens at public meetings and of those who organize and effectuate a petition drive. Where the former would involve the

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[3] The court in *Arthur v. City of Toledo* made it clear that its concern centered on the propriety of overturning the results of facially neutral referendums. 782 F.2d 565, 573 (6th Cir. 1986) ("[T]his court will not lightly set aside the results of voter referendums.").

[4] Indeed, the Ohio Supreme Court has already accomplished that end by finding that the defendants' use of the referendum in this case violated the Ohio Constitution. *See Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls* , 697 N.E. 2d 181, 186 (Ohio 1998) ("The passage by a city council of an ordinance approving a site plan for the development of land, pursuant to existing zoning and other applicable regulations . . . is not subject to referendum proceedings.").

> scrutiny of "people acting in a legislative capacity," the latter is simply an attempt to "gather additional information concerning the basis of opposition to the [ordinance]."

Buckeye Cmty. Hope Found., 970 F.Supp at1318 (quoting *United States v. City of Birmingham*, 538 F.Supp. 819, 829 (E.D. Mich. 1982)). The holding in *Arthur* simply does not apply to the facts of this case.

The Sixth Circuit has, on several occasions, found an equal protection violation where city officials gave effect to the race-based opposition of citizens who sought to block low-income housing from infiltrating their predominantly white communities. In *United States v. City of Birmingham*, the district court ruled that a city was liable for its obstruction of a racially integrated housing project where the decision-making body's impedance of the project was a response to the racial animus of a majority of its virtually all-white community. 538 F.Supp. at 828. The court stated:

> The government need not prove that the [decision-making body] itself intended to discriminate on the basis of race in order to establish that the City acted with a racially discriminatory intent. In order to demonstrate a city's racially discriminatory intent, it is sufficient to show that the decision-making body acted for the sole purpose of effectuating the desires of private citizens, that racial considerations were a motivating factor behind those desires, and that members of the decision-making body were aware of the motivations of the private citizens. Any other rule of law would permit a legislative body to place its official stamp of approval on private racial

> discrimination.

Id. (citing *United States v. City of Black Jack*, 508 F.2d 1179, 1185 n.3 (8th Cir. 1974)). The Sixth Circuit affirmed the district court's determination that the actions of the city had been racially motivated, citing the lower court's findings that unlawful racial motivation was properly inferred from

> the views expressed by a significant number of opponents of [the low-income housing project] (uttered both on the public record and within the hearing of those who testified at trial); a [decision-making body] that knowingly pursued policies that appeased those who expressed these bigoted views . . . [and] the decision to conduct an advisory referendum on the [low-income housing project] . . . .

United States v. City of Birmingham, 727 F.2d 560, 564 (6th Cir. 1984). Furthermore, in *United States v. City of Parma*, the Sixth Circuit affirmed a lower court's invalidation of an ordinance requiring all proposals for low-income housing to be submitted to a voter referendum, finding that the ordinance was racially motivated. 661 F.2d 562, 578 (6th Cir. 1981).

We also find the Fourth Circuit's decision in *Smith v. Town of Clarkton*, 682 F.2d 1055 (4th Cir. 1982), to be an instructive case on point. In *Smith*, a black resident of Clarkton, North Carolina sued the city alleging that the city, "bowing to pressure from public sentiment in Clarkton, ordered the town's withdrawal from the multi-municipality [low-income] housing authority, effectively blocking construction of . . . fifty units of housing." *Id.* at 1059. The Court noted that the evidence at trial established that "the actions of the defendants terminating the project resulted

directly from the community's deep felt, intentional, invidious racial animus . . . ." *Id.* at 1065. As in the case at bar, there was evidence that the mayor echoed the concerns of the citizenry in a manner that highlighted the racial nature of the opposition. For instance, there was testimony to the effect that "Mayor Fort was concerned about an influx of 'undesirables.'" *Id.* The Court ultimately found discriminatory intent under the Fourteenth Amendment based on "evidence of . . . statements by citizens, including the defendants, which in a different context might not illustrate racial bigotry, but against the background of . . . considerable opposition to [the housing project] were interpreted by the trial court as 'camouflaged' racial expressions." *Id.* at 1066.

In light of these established principles, it is beyond peradventure that this court may properly view the statements made by residents of Cuyahoga Falls as additional information concerning the basis of the opposition to the proposed housing project. *See Contreras v. City of Chicago*, 119 F.3d 1286, 1292 (7th Cir. 1997) ("Of course, private citizens' motivations and government officials' knowledge of these motivations may be quite relevant to the ultimate issue of the government officials' purposes.").

In sum, plaintiffs have produced sufficient evidence to raise a genuine issue of material fact as to whether (1) the opposition to the low-income housing project reflected racial bias; and (2) whether the defendants gave effect to that racial bias by allowing the referendum to stay the effectiveness of plaintiffs' City Council-approved site plan. Accordingly, the district court erred in dismissing plaintiffs' equal protection claim on summary judgment.

C. Fair Housing Act

The Fair Housing Act ("FHA"), 42 U.S.C. § § 3601, et seq. states that it is unlawful to " make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). The standard for finding discriminatory intent is the same under the Fair Housing Act and the Equal Protection Clause of the Fourteenth Amendment. *See City of Parma*, 494 F.Supp at 1053. Plaintiffs claim that by staying the effectiveness of the site plan ordinance and consequently refusing to grant building permits pursuant to that ordinance, the City intentionally gave effect to the discriminatory anti-minority biases of its citizens and therefore violated § 3604(a) by making dwellings unavailable to potential home builders/buyers based on their race. As noted above, there are genuine issues of material fact as to whether the defendants gave effect to the racial bias of its citizens when they stayed the effectiveness of the site plan ordinance.

Even if plaintiffs fail to prove that defendants intended to discriminate on the basis of race, they also have a valid claim under the FHA on the theory that defendants' actions had a disparate impact based on race. In *Arthur v. City of Toledo*, the Sixth Circuit stated that at least under certain circumstances, a violation of the Fair Housing Act can be established by a showing of discriminatory effect without a showing of discriminatory intent. 782 F.2d at 574-75 (citing *Metro. Housing Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977)). The court enumerated three factors for determining whether conduct which produces a discriminatory effect violates the Fair Housing Act: (1) how strong is the plaintiffs' showing of discriminatory effect; (2) what is the defendants' interest in taking the action complained of; and (3) does the plaintiff seek to compel the

defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing. *Id.* at 575 The first prong--the strength of the plaintiffs' showing of disparate impact--supports plaintiffs' claim. Judge Polster acknowledged in his opinion below that there are sufficient facts in the record to conclude that the defendants' actions had a disproportionate impact on blacks. J.A. at 68 ("There is no doubt that the repeal of the Ordinance approving development of a low income housing site had a disparate impact on racial minorities . . . ."). The second prong-- the defendants' interest in taking the action complained of--also supports plaintiffs' disparate impact claim. In particular, we find dispositive the Ohio Supreme Court's decision concluding that the defendants' use of the referendum to deny plaintiffs' the benefit of their site plan violated Ohio's Constitution. *See Buckeye Cmty. Hope Found.*, 697 N.E. 2d at 186. Finally, with respect to the third prong, the plaintiffs did not seek to compel the defendants to affirmatively provide housing for members of minority groups; rather, they sought to restrain the defendants from interfering with the effectiveness of plaintiffs' lawfully approved site plan. Thus, all three factors support plaintiffs' disparate impact claim.

Despite this strong showing of disparate racial impact, plaintiffs cannot prevail unless there are "highly unusual circumstances" present in this case. *Arthur*, 782 F.2d at 575 ("[A]bsent highly unusual circumstances, the discriminatory effect of a referendum cannot establish a violation of the Fair Housing Act."). We find that there are "highly unusual" circumstances present in this case that support a disparate impact analysis. For example, Cuyahoga Falls has *never* used

the powers of referendum to reject a site plan ordinance before this case. An even more unusual circumstance is the fact that the Ohio Supreme Court found that the defendants' use of the referendum to reject plaintiffs' site plan violated the Ohio Constitution. *See Buckeye Cmty. Hope Found.*, 697 N.E. 2d at 186. Certainly, these circumstances are "highly unusual" for purposes of discriminatory impact analysis. In sum, we find that there are genuine issues of material fact as to whether defendants' actions had a disparate racial impact in violation of the FHA.

Plaintiffs also argue that defendants violated their rights under the FHA by giving effect to the anti-family biases of its citizens. *See* 42 U.S.C. § 3604(a) (making it unlawful to refuse to sell or rent or to "make unavailable or deny, a dwelling to any person because of . . . familial status"). An examination of the record reveals that a jury could reasonably conclude that public opposition to the project was also premised on fears that the large influx of children would change the character of the neighborhood. For example, at the March 4, 1996 City Council meeting, resident Larry Hart remarked that he did not feel a five foot fence is sufficient buffer between the retirement community and a complex with over 100 children. J.A. at 954. Lisa Rasko, another resident, commented that she was concerned about the educational quality in the school district; specifically, she worried about the class size with the influx of children. J.A. at 958. At the March 18, 1996 City Council meeting, one resident objected to the project because "[t]here will be . . . kids running around in our yards." J.A. at 949. Finally, James Kuznik, a tester for the Fair Housing Advocates Association, testified that members of the Citizens for the Preservation of Voting Rights--which mobilized support for the referendum--made

statements dealing with children. J.A. at 1359-59. According to Kuznik, "[i]t was the children they were worried about." *Id.* These statements, viewed in the light most favorable to the plaintiffs, evidence an anti-family bias that runs contrary to the clear dictates of the Fair Housing Act. Accordingly, there is a genuine issue of material fact as to whether the defendants gave effect to the anti-family bias of its citizens by staying the site plan ordinance.

In sum, the district court erred in granting summary judgment on plaintiffs' Fair Housing Act claims since there are genuine issues of material fact concerning defendants liability under the FHA which should be resolved by a jury.

D. Substantive Due Process

Plaintiffs contend that the defendants' use of a referendum to deny the effectiveness of their site plan deprived them of substantive due process. In *Pearson v. City of Grand Blanc*, the Sixth Circuit defined substantive due process as "[t]he doctrine that governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed . . . ." 961 F.2d 1211, 1216 (6th Cir. 1992) (quoting Comment, *Developments in the Law--The Constitution and the Family*, 93 Harv L. Rev. 1156, 1166 (1980)). Substantive due process involves the "right not to be subject to 'arbitrary or capricious' action by a state either by legislative or administrative action . . . ." *Id.* at 1217.

In order "[t]o establish a violation of substantive due process, a plaintiff must first establish the existence of a constitutionally protected property or liberty interest." *Silver v. Franklin Township, Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992). "An abstract need or unilateral expectation does not suffice to create a property interest;

rather, a person must 'have a legitimate claim of entitlement.'" *Richardson*, 218 F.3d at 517 (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972)).

Defendants rely heavily on this court's decisions in *Silver v. Franklin Township, Bd. of Zoning*, 966 F.2d 1031 (6th Cir. 1992) and *Triomphe Investors v. City of Northwood*, 49 F.3d 198 (6th Cir. 1995) to support their claim that the plaintiffs did not have a legitimate claim of entitlement to the approval of their site plan and to the building permits. In *Silver*, a property owner alleged that the township board's denial of a conditional zoning certificate violated substantive due process. 966 F.2d at 1033. We held that because the board had discretion to grant a conditional zoning certificate, the plaintiff "possessed neither a legitimate claim of entitlement to the zoning certificate nor a justifiable expectation that the [b]oard would issue the certificate." *Id.* at 1036. In *Triomphe*, property owners brought suit against city council members alleging that the council's denial of a special use permit violated substantive due process. Relying on our decision in *Silver*, we held that since the city council had discretion to grant or deny plaintiffs' special use permit, the plaintiffs did not have a legitimate claim of entitlement to the permit. 49 F.3d at 203-04. In the case at bar, defendants argue that since site plan approval is discretionary, plaintiffs do not have a legitimate claim of entitlement to the approval of the site plan and therefore do not have a constitutionally protected property interest.

Defendants' reliance on *Silver* and *Triomphe* is misplaced for two reasons. First, in both of those cases, the property owners faced an obstacle not present in the case at bar: the proposed use of their property did not comport with the

existing zoning regulations. Accordingly, in *Silver*, the plaintiff sought a special use permit, and in *Triomphe*, the plaintiffs sought a conditional zoning certificate. In contrast, "the [p]laintiffs are not seeking to change a reasonable zoning restriction, instead they are challenging . . . whether they themselves are allowed to enjoy the rights created by an already-existing zoning scheme." *Buckeye Cmty. Hope Found.*, 970 F.Supp. at 1314. Second, the alleged property interest at stake in both *Silver* and *Triomphe* arose from the failure of the decision-making bodies to approve plaintiffs' proposed use for their respective properties. However, in the case at bar, the City Council actually approved plaintiffs' site plan after having concluded that the site plan conformed with the existing zoning regulations. Thus, the property interest at stake in this case arose from the City Council's approval of plaintiffs' site plan and the alleged substantive due process violation resulted from defendants' use of a referendum to deny plaintiffs the *benefit* of their lawfully approved site plan. One tangible benefit of site plan approval is a building permit which would have allowed construction on the plaintiffs' project to begin. [5]

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[5] Defendants argue that the building permits were properly denied because the plaintiffs had failed to fulfill one of the conditions for granting the permit--namely, building a costly fence on one end of the property. However, as Judge Bell pointed out below, "the facts make it clear that the building of the fence by [p]laintiffs would have been a futile act--what the Sixth Circuit has referred to as 'a waste of time and money. . . . The [d]efendants had already concluded that the building permits could not issue due to the ineffective site plan ordinance." *Buckeye Cmty. Hope Found.*, 970 F. Supp. at 1309 n. 21 (quoting *Bannum, Inc. v. City of Louisville*, 958 F.2d 1354, 1362 (6th Cir. 1992)) (citations omitted); *see also* J.A. at 1269

In light of the property interest at stake, we find this court's decision in *Nasierowski Brothers Investment Co. v. City of Sterling Heights*, 949 F.2d 890 (6th Cir. 1991) to be instructive. In *Nasierowski*, the plaintiff sought to purchase an undeveloped parcel of real estate. *Id.* at 891. Nasierowski's acquisition of the property was made expressly contingent on obtaining an opinion from the city stating that its proposed development was permitted as of right. *Id.* The city so informed Nasierowski, and he purchased the property. *Id.* After Nasierowksi's purchase, however, it became obvious that at least one member of the city council was strongly opposed to the proposed use of the undeveloped land. The city council subsequently approved an ordinance that changed Nasierowki's zoning classification from "general business" to "office development," effectively halting Nasierowski's efforts to develop the property. *Id.* We held that "Nasierowski had a property interest in the old zoning classification within which his development was permitted. That property interest was securely vested by Nasierowski's engagement in substantial acts taken in reliance, to his detriment, on representations from and affirmative actions by the City." *Id.* at 897. Similarly, in the case at bar, plaintiffs' property interest was securely vested upon the City's affirmative representation that the site plan conformed with the existing zoning regulations as reflected by the City's approval, by ordinance, of the site plan.

Having determined that plaintiffs have a cognizable property interest at stake, the next question is whether the defendants are "guilty of arbitrary and capricious action" in

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(testimony of Mr. Boone who stated that work on the fence did not begin "because it became pretty obvious that we are in a fight and . . . we don't have the funds to put up a $70,000 fence.").

denying plaintiffs the benefit of their City Council-approved site plan. *Pearson*, 961 F.2d at 1221. Judge Polster found that the defendants' actions were not arbitrary and capricious because the City was simply following its own law providing for the use of referendum. J.A. at 60. However, the Supreme Court has stated that "[i]f the substantive result of the referendum is arbitrary and capricious . . . then the fact that the voters . . . wish it so would not save the [zoning] restriction." *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 676, 96 S.Ct. 2358, 2363, 49 L.Ed.2d 132,139 (1976); *cf. Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710, 716 (6th Cir. 1991) ("The concern is that the voters might 'gang up' to drive out of business a seller of liquor whom they disliked for reasons unrelated to any plausible public interest. This is a distinct type of arbitrary action that the requirement of fair procedure is designed to prevent . . . .) (quoting *Philly's v. Byrne*, 732 F.2d 87, 92 (7th Cir. 1984)). Thus, the question remains whether the defendants' actions were arbitrary and capricious.

To prevail on a substantive due process claim, "a plaintiff must show that the state administrative agency has been guilty of 'arbitrary and capricious action' in the *strict* sense, meaning that 'there is no rational basis for the . . . [administrative] decision.'" *Pearson*, 961 F.2d at 1221 (quoting *Stevens v. Hunt*, 646 F.2d 1168, 1170 (6th Cir. 1981)). We find the Fifth Circuit's decision in *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981) to be on point. In *Wheeler*, the developers had a legitimate permit under an existing zoning ordinance to build an apartment complex. *Id.* at 100. However, news of the construction of the apartment complex caused an uproar. *Id.* A referendum was held, which showed an overwhelming resistance to the

proposed apartment complex. The upshot of the referendum was the passage of a new city ordinance which forbade the construction of new apartments. *Id.* The Fifth Circuit noted that if a zoning ordinance is "'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare'" it must be struck down. *Id.* (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926)). The Court found that the city's deference to the majority will as reflected in the new ordinance was not rational and therefore violated plaintiff's right to due process. *Id.* Similarly, in *TLC Development Inc., v. Town of Brandford*, a lower court held that:

> A town, through its Commission, cannot arbitrarily refuse to permit a landowner to use land if the proposed use comports with the uses permitted in the district in which the land is located. By articulating the uses permitted in a district, a town has fixed the uses which accommodate all the considerations permitted by the law in adopting a town plan. Once it has done so, a town cannot prevent a permitted use based on factors which might have been, or were, considered in deciding the uses permitted in the zoning district.
>
> 855 F. Supp. 555, 558 (D. Conn. 1994).

Both *Wheeler* and *TLC Development* establish that when a city denies a landowner the benefit of a general zoning scheme, despite its belief and/or knowledge that the landowner's property is entirely consistent with that scheme, it runs afoul of the Fourteenth Amendment's guarantee of due process. Plaintiffs have presented substantial evidence that their proposed complex met all of Cuyahoga's legal

requirements. Planning Director Louis Sharpe testified that "I have no rational reasons whatsoever to say that there is anything wrong with [plaintiffs'] site plan . . . . [T]he plan met the requirements of the City of Cuyahoga Falls in all respects, it exceeded those, and I would find no reason to deny it on a legal or professional basis." J.A. at 722. Mr. Stroup, another member of the Planning Commission, stated that the Commission has an obligation to approve the site plan because it exceeds the zoning requirements. J.A. at 158. Plaintiffs' expert witness, Allen Fonoroff, stated that:

> the public vote rescinding Ordinance No. 48-1996 which had approved the Site Plan for the Pleasant Meadow Apartment Complex was not based on compliance with municipal zoning and land use[] laws of the City of Cuyahoga Falls. Ballot box decision-making exacerbates the problems inherent within traditional zoning decisions. The results are usually more extreme than those decided by local Planning Commissions since the public tends to react and vote their fears and prejudices (namely lowering of property values, introduction of incompatible lifestyles and the tax burden of new children on the local school system) as reasons for denying an appropriate lawful site plan.

J.A. at 737. Fonoroff concluded that there was no rational basis for the rejection of the site plan as it conforms completely with all of the City's regulations. J.A. at 733. Indeed, Mayor Robart forthrightly acknowledged that the issue was not whether the project was properly zoned, but rather the issue was low-income housing. J.A. at 945. While the Mayor's statement may reflect the views of his constituents, it directly contravenes the legal opinion of the

City's own law director, who wrote "[the] rejection [of a site plan] must be based upon those site related factors mentioned in the zoning code." J.A. at 817. Despite being aware that plaintiffs' project was entirely consistent with the zoning code, the defendants allowed a referendum to decide whether plaintiffs' project would go forward. Clearly, plaintiffs have presented sufficient evidence to create a genuine issue of material fact as to whether the defendants, by denying plaintiffs the benefit of the lawfully approved site plan, engaged in arbitrary, irrational, and therefore unconstitutional application of the law in violation of plaintiffs' right to due process. [6]

E. Res Judicata

Defendants also assert that plaintiffs' federal claims are barred by the doctrine of *res judicata* since the federal suit stems from the same transaction or occurrence as the state suit which sought to enjoin the referendum. We find that Judge Bell's exhaustive treatment of this issue below to be persuasive; accordingly, we adopt the lower court's finding that plaintiffs' suit is not barred by *res judicata*. *See Buckeye Cmty. Hope Found.*, 970 F. Supp at 1297-1303.

III. CONCLUSION

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[6] Plaintiffs in their brief also assert a procedural due process claim based on defendants "subjecting them to . . . an extra layer of administrative process--a procedure without clear, rational rules to which they could look for guidance in planning to develop their property." *See* Plaintiffs' Br. at 50. This is actually a substantive due process claim, since the claim essentially amounts to an attack on the rationality of the referendum procedure itself. Therefore, this claim merges with the substantive due process arguments discussed above.

For the foregoing reasons, we find that there are triable issues of fact with respect to plaintiffs' equal protection, Fair Housing Act, and substantive due process claims; accordingly, we **REVERSE** the district court's grant of summary judgment.

APPENDIX B

UNITED STATES DISTRICT COURT,
N.D. OHIO,
EASTERN DIVISION
November 29, 1999
No. 5:96 CV 1458

BUCKEYE COMMUNITY HOPE FOUNDATION, et al.,
Plaintiffs,

v.

CITY OF CUYAHOGA FALLS, et al.,
Defendants.

JUDGE DAN AARON POLSTER

Before the Court are cross-motions for summary judgment (Doc. Nos. 143, 151).Plaintiffs (collectively, the "Developers") move for partial summary judgment on their substantive due process claims (Counts 2 and 4 of its First Amended Complaint). Defendants move for summary judgment on all claims, *i.e.*, the substantive due process claims, a Fair Housing Act claim (Count 1), and an equal protection claim (Count 3).

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ, P. 56(c). All facts and inferences drawn therefrom must be viewed in a light most favorable to the nonmoving party. See *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376,378 (6th Cir. 1993). If, after reviewing the record as a whole, a rational factfinder could not find for the nonmoving party, summary judgment is appropriate since there is no genuine issue for trial. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

I. FACTS

To recount briefly the salient facts of this case,[1] Buckeye Community Foundation("Buckeye") is a nonprofit corporation that develops affordable housing by utilizing low income housing tax credits. The relationship between the plaintiffs has been previously established.[2] In June 1995, Buckeye expressed an interest in developing a low income housing project in the City of Cuyahoga Falls (the "City") to Mayor Don Robart who expressed no objection.

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[1] See *Buckeye Community Hope Found. v. City of Cuyahoga Falls*, 970 F.Supp 1289,1292-296(N. D. Ohio 1997) ("Buckeye (federal)") for a detailed account of the facts. Disputed facts will be construed in the plaintiffs' favor.

[2] The parties dispute whether one of Buckeye's prospective contractors and its architect have standing to bring these federal claims. The Court finds that they do not. The relationship between the remaining plaintiffs is set forth at Buckeye (federal), 970 F.Supp. at 1293, 1303-306.

Buckeye thereafter bought the land and began working with the City Planning Director on development details. After the site plan was submitted to the City Planning Commission for review, it was approved subject to certain conditions. One of the conditions required the Developers to erect a fence on one side of the site before the building permit for the apartment complex could issue.

Pursuant to the Charter of Cuyahoga Falls (the "Charter"), the recommendation was presented to the City Council for approval.[3] The Mayor immediately expressed his opposition to the site plan to Council members. Despite his opposition, the site plan was approved — after three Council meetings — in the form of Ordinance No.48-1996 (the "Ordinance") by a six-to-three vote of the City Council on April 1, 1996. Within days, the Developers applied for a building permit. A permit to build the fence was issued later that month; however, the fence was never built.[4]

Parallel to the site plan approval process, a referendum effort was building. The Charter provided that the citizens of Cuyahoga Falls had "the power to approve or reject at the polls any ordinance or resolution passed by the Council."[5] Several referendum meetings were held. The Mayor attended some of them and clearly supported the referendum effort.

On April 30, 1996, referendum petitions with the requisite number of signatures were submitted to the Clerk of City Council who, in turn, certified the petitions to the Summit County Board of Elections (the "Board of Elections"). The

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[3] Charter, Article VIII, Section 1.

[4] Council approval was not necessary to build the fence.

[5] Charter, Article IX, Section 2 (emphasis added).

petitions requested a referendum to approve or reject the Ordinance approving the site plan. On May 1, 1996, the Board approved the referendum.

That same day, the Developers filed an action in state court to enjoin the referendum. They contended that the Ordinance could not be challenged by referendum because its passage by City Council was an administrative act, as opposed to a legislative act. The Developers argued that Section If, Article II of the Ohio Constitution did not grant to citizens referendum powers on administrative actions taken by municipal legislative bodies, and that Council approval of the site plan was an administrative act. Section 1 f, Article II (the "referendum provision") provides,

> The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers may be exercised in the manner now or hereafter provided by law.

Id. That referendum provision is the sole constitutional source of referendum powers reserved to municipalities. On May 31, 1996, the Developers' motion for preliminary or permanent injunction was denied on the underlying merits.[6]

On June 20, 1996, the Developers once again requested issuance of a building permit. This request was denied by the City Engineer, who indicated by letter that he could not issue the permit in light of the pending referendum. The Court has previously affirmed this opinion, ruling that various Charter

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[6] The parties agreed that the injunction hearing would be a trial "on the merits."

provisions operated as a freeze on the issuance of a building permit.[7]

On July 5, 1996, the Developers filed this case alleging that the defendants violated housing discrimination laws under the Fair Housing Act and the Equal Protection Clause of the United States Constitution, and denied them substantive due process under the Fourteenth Amendment of the U. S. Constitution. The Developers' motion for a preliminary injunction was denied in November 1996. The voters elected, by referendum, to repeal the Ordinance approving the site plan.

Meantime, the decision of the state court that the referendum was authorized by the Ohio constitution was affirmed on appeal. On May 6, 1998, the Ohio Supreme Court also affirmed that decision, holding by a 4-3 margin that the referendum did not violate the referendum provision of the Ohio Constitution.[8] Two months later, however, upon reconsideration, one Justice changed his opinion and the Ohio Supreme Court reversed itself, holding that the referendum did indeed violate that provision.[9]

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[7] See *Buckeye (federal)*, 970 F.Supp. at 1307-308.

[8] *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 81 Ohio St.3d 559, 692 N.E.2d 997 (May 6, 1998) ("*Buckeye I*").

[9] *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 82 Ohio St.3d 539,697 N.E.2d 181 (Jul. 16, 1998) ("*Buckeye II*"). More specifically, the Supreme Court held that the City Charter provision permitting referenda on all ordinances enacted by the City Council was constitutionally invalid as applied to administrative acts. The City Charter could not bestow upon the citizens of Cuyahoga Falls greater powers than those

On June 20, 1997, the Court granted in part, and denied in part, preliminary summary judgment motions in this case.[10] The second set of summary judgment motions, currently pending, address the only issues that survived the first ruling. Those issues are: (1)whether the City violated substantive due process by certifying the referendum petition and/or refusing to deliver the building permit to the Developers, (2) whether the City violated the equal protection clause based on race, and (3) whether the City violated the Fair Housing Act based on discriminatory intent and/or disparate impact.[11]

At the last status conference on July 26, 1999, the Developers advised the Court that they were proceeding to build the low income housing project.

II. LAW AND ANALYSIS

As a preliminary matter, the Court notes that if the 1996 referendum were to take place *today*, it would clearly violate the referendum provision of the Ohio Constitution under the Ohio Supreme Court's most recent ruling. However, even a properly-authorized referendum can be found to be discriminatory or otherwise violate certain rights under the U.S. Constitution.

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granted by Section If, Article II of the Ohio Constitution. The Court also found that Council could not designate an action as "legislative" simply because it so desired. Rather, it was the nature of the action that determined whether it is legislative or administrative. It concluded that the Ordinance at issue merely formalized an administrative act. *Id.*

[10] The Court's ruling is reported at *Buckeye (federal)*, 970 F.Supp. 1289.

[11] *Id.*

A. Substantive Due Process Claim

Counts 2 and 4 raise the issue of substantive due process. Specifically, Count 2 alleges that the acts of the defendants Clerk of Council and City Engineer were "arbitrary, capricious and unreasonable acts which bear no relation to any legitimate or compelling state interest..." Count 4 alleges that the City officials' acts constituted an unlawful delegation of the zoning power to the electorate. The Developers contend that the City Charter, as applied, operated to deny them due process of law when the City refused to issue them a building permit, after having fulfilled substantially all of the preliminary legal requirements for obtaining one. In other words, the Charter deprived them of their entitlement to the permit in an arbitrary and capricious manner.

In order to sustain a substantive due process claim, the Developers must first show that they had a "legitimate claim of entitlement" to the building permit, or a "justifiable expectation" that they would not be dispossessed of that right. *Silver v. Franklin Township Board of Zone Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992). Once established, the Developers must then show that the governmental action denying that right or entitlement was arbitrary or capricious, *i.e.*, that there was no rational basis for the denial. *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1221 (6th Cir. 1992).

The Court need not address the preliminary issue of entitlement because the Developers cannot show that any act of a City official or the electorate was arbitrary or capricious, or that the City's failure to issue them a building permit in 1996 was irrational.[12] The undisputed evidence shows that

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[12] The Court is not convinced that the Developers have established that they had a due process entitlement to the building

City Council approved the site plan. The approval of the plan was formalized, as was customary, by ordinance. The Charter permitted referenda on 'all ordinances. ..passed by the Council.' All parties agree that the citizens of Cuyahoga Falls submitted facially neutral referendum petitions with the requisite number of signatures to the Clerk of City Council. Pursuant to the Charter, the Clerk certified the petitions and submitted them to the Board of Elections. The Board of Elections approved the referendum and put the Ordinance to a vote. The Ordinance approving the site plan was thereafter repealed. Until July, 1998, the propriety of the referendum was confirmed by three state courts, including the Ohio Supreme Court.

Additionally, the City was legally prohibited from issuing a permit to the Developers pending the outcome of the referendum. The referendum passed, repealing the Ordinance that approved the site plan, Thus, there was no time (until the Supreme Court reversed itself in July 1998) during which the City had any legal authority to issue a permit to the Developers.

The evidence shows that the City did issue a permit to the Developers to build a fence. Construction of the fence was a precondition to obtaining a permit to build the apartment

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permit simply because Council approved their site plan. Council's approval of the plan was not only discretionary , but conditional .It depended on the fulfillment of numerous conditions, one of which was the building of a fence. Although the Developers have successfully argued (for ripeness purposes) that it would have been fruitless to build a fence under the circumstances, the fact is the fence was never built. Without satisfying all conditions, the Developers are hard-pressed to argue that they were constitutionally entitled to a building permit.

complex, but the fence was never built.[13] Hence, at least one of the conditions for receiving a building permit was never fulfilled. The Court finds that all actions undertaken by the City (and the electorate) have a rational basis in the law.

The Developers allege that it was arbitrary and capricious for the Clerk to certify the petitions to the Board of Elections. In Cuyahoga Falls, when a referendum petition is filed, the Clerk of City Council is required by Charter to submit the same to the Board of Elections.[14] The petitions were facially neutral and they contained the requisite number of signatures. Under the circumstances, it would have been remiss for the Clerk to withhold the petitions from the Board.

Furthermore, it was not evident to anyone in 1996 — let alone the Clerk — that such referenda violated the Ohio Constitution. The City Charter expressly permitted such referenda and there was no reason for the Clerk to think otherwise. Three courts reinforced this assumption — including the Ohio Supreme Court. The fact that the highest state court issued contradictory 4-3 rulings on this issue in less than three months shows just how close this question of state law was. Surely, the Cuyahoga Falls Clerk (or any other City official) cannot be charged with any greater knowledge of the law than the state courts of Ohio.

The Developers also allege that the City Engineer's decision to deny issuance of the permit was arbitrary and

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[13] The Court previously ruled (for ripeness purposes) that the building of a fence would have been futile, *i.e.*, an unnecessary prerequisite to filing this lawsuit. This finding, however, does not change the fact, for due process entitlement purposes, that the fence was never built.

[14] Charter, Article IX, Section 2.

capricious. The Court has already ruled that the City was without authority to issue the building permit.[15] Moreover, the Engineer sought advice from the Law Director before refusing to issue the permit. The Engineer simply relayed the information the Law Director gave to him to the Developers. The Court finds that the City Engineer's refusal to issue the permit pursuant to the Charter and the advice of counsel was neither arbitrary nor capricious.

Judge Bell previously found that the evidence did not support the Developers' assertions that the Mayor organized the petition drive, secured meeting places for the citizen group opposed to the project, certified the petition, or submitted the referendum question to the Board of Elections.[16] Plaintiffs have provided no additional evidence otherwise.[17] Even if plaintiffs could establish that the Mayor was the force behind the referendum, however, there is no evidence that the Mayor had any legal authority to issue a permit.

The Developers ultimately rest on the purely legal argument that, because the referendum was unauthorized under state law, there was no rational legal basis for the acts of City officials in refusing to issue a building permit.[18] In other words, because Council's approval of the site plan could

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[15] See *Buckeye (federal)*, 970 F.Supp. at 1307-308.

[16] *Id.*, 970 F.Supp. at 1321.

[17] Plaintiffs allege that the Mayor may have made a City building available for a referendum meeting. This unsupported allegation is insufficient to make this due process claim survive summary judgment.

[18] See Plaintiffs' Motion for Partial Summary Judgment, Doc. No. 143.

not be put to popular vote, the Developers were entitled to a building permit. The Court disagrees. The Developers were not entitled to a permit to build the apartment complex until they satisfied all the requisite conditions. Granted, the referendum frustrated the Developers' incentive to fulfill those conditions, but there is no factual dispute that all conditions were not met.

The Supreme Court's after-the-fact decision that the 1996 referendum was not authorized under the Ohio Constitution does not automatically turn the acts of the electorate, the Clerk, the City Engineer, or the Mayor into violations of substantive due process under the United States Constitution. Such claims require irrational conduct, and the Developers have failed to establish a factual issue regarding the reasonableness of the City's actions — notwithstanding the opinion of an expert to the contrary .

Based on the undisputed evidence, the Court finds that it was neither arbitrary nor capricious for the electorate to bring the referendum, for the City to certify the petitions to the Board of Elections, or for the City to refuse to issue the building permit. Thus, the Court dismisses the substantive due process claims as a matter of law. If the defendants' conduct in this case is to be found actionable at all, it must be shown to be discriminatory.

B. Equal Protection Claim - Intentional Discrimination

Plaintiffs claim that defendants violated the Equal Protection Clause of the United States Constitution on the basis of race. The United States Supreme Court articulated the prerequisites for bringing such a claim:

> [O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate

> impact. 'Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination. ' Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection clause.

Village of Arlington Heights v .Metropolitan Housing Development Co. 429 U.S. 252, 264-65(1977) citing *Washington v. Davis*, 426 U.S. 229 (1976). All parties agree that a showing of discriminatory intent on the part of *City officials* is necessary for the Plaintiffs to prevail on their equal protection claim. The only officials whose actions are at question here are those of the Mayor, the Clerk of City Council, and the City Engineer.

The Sixth Circuit has held that the following four factors are probative of racially discriminatory intent:

> (1) the racial impact of an official action;
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> (2) the historical background of the decision;
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> (3) the sequence of events leading up to the challenged decision, including departures from normal procedures and substantive norms; and
>
> (4) the legislative or administrative history of the decision.

United States v. City of Birmingham, Mich., 727 F.2d 560,565 (6th Cir. 1984).

Importantly, a district court cannot inquire into the electorate's motivations in an equal protection clause context "absent a referendum which discriminates facially, or one where although facially neutral, the only possible rationale is racially motivated." *Arthur v. City of Toledo*, 782 F.2d

565,573 (6th Cir. 1986) (emphasis added).[19] Policy considerations limit a court's examination of the factors motivating the electorate in a referendum election, *e.g.*, the difficulty of ascertaining the electorate's motivations and the fact that "the bigoted comments of a few citizens, even those with power, should not invalidate action which in fact has a legitimate basis." *Clarke v. City of Cincinnati*, 40 F.3d 807,815 (6th Cir. 1994) (citations omitted).

All parties agree that the referendum at issue was facially neutral. The Court now finds that racial discrimination, if present, was not the only possible explanation for the 1996 referendum. It is quite possible that the citizens of Cuyahoga Falls may have demanded the referendum for, *inter alia*, safety or economic reasons. This is in fact borne out by the testimony of referendum proponents.

One supporter was concerned about the location of the development. He testified that access to the site was inadequate and that fire trucks might not be able to get in to the development in the winter.[20] Another argued that a newly-opened school did not have enough capacity for the anticipated number of new students the development would bring.[21] A third supporter, noting that he had just paid an

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[19] See also *Equality Foundation of Greater Cincinnati v. City of Cincinnati*, 128 F .3d 289, 293 (6th Cir. 1997) (in reviewing district court decisions, "[the Sixth Circuit] may not even inquire into the electorate's possible actual motivations for adopting a measure via initiative or referendum.Instead, the court must consider all hypothetical justifications which potentially support theenactment.").

[20] William Suren Deposition, p. 33.

[21] Frank Pribonic Deposition, pp. 54-55.

additional $300/year in real estate taxes for a recently-passed levy, testified that he could not afford another levy to alleviate the impact on the school system.[22] Because there are rationales other than racial discrimination that may have (and did in fact) motivate the voters, the Court may not 'inquire into' the entire electorate's motivations in petitioning for the referendum. *Arthur*, 782 F.2d at 573.

The issue, then, is whether city officials intended to discriminate on the basis of race by submitting the referendum petitions to the Board of Elections, or by withholding the building permit from Buckeye. The Court finds that plaintiffs have provided absolutely no evidence that the Clerk or City Engineer had any racial animus in carrying out their ministerial functions. Thus, the Court will focus solely on the conduct of the Mayor.

The undisputed evidence shows that Mayor Robart opposed the site plan and voted against it at the City Council meeting. Plaintiffs contend that the Mayor's support of the referendum was motivated by racial discrimination — citing a statement he made at the March 18, 1996 City Council meeting:

> [T]he issue is low income housing ...That is the whole issue here. Density is not an issue here.[23]

At the March 4, 1996 Council meeting, the Mayor talked about an article called "Stuck in the Ghetto" and discussed the

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[22] Lee Minier Deposition, p. .26.

[23] Minutes of March 18, 1996 Cuyahoga Falls City Council Meeting.

effect of busing on Cleveland's schools.[24] He discussed how Cuyahoga Falls had "done [their] part off Graham Road," referring to the only Cuyahoga Falls development with a substantial number of African Americans.[25]

The Court is aware of no law that prohibits the Mayor from expressing his opinion in Council meetings, or requires him to cast his Council vote a certain way. Obviously, the Mayor's opinion did not hold much weight with Council because the plan was approved despite his opposition. The Court finds that the Mayor's isolated, obscure comments made within the context of a Council meeting are insufficient as a matter of law to show racial animus, and had no bearing *in fact* on Council's approval of the site plan.

The undisputed evidence also shows that the Mayor supported the referendum effort. However, there is no law prohibiting the Mayor from supporting the referendum, and the plaintiffs have provided no evidence that he made discriminatory comments at any referendum support meetings. Indeed, a Fair Housing Advocacy "tester" sent to one of the meetings to detect discrimination testified that Robart made no discriminatory comments at all.[26]

Assuming the Mayor did have a racial animus, there is no evidence that he was responsible for certifying the petitions or denying the building permit. The undisputed evidence shows that the Clerk submitted the petitions to the Board of Elections, and the City Engineer denied issuance of a building

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[24] See Reply of Plaintiffs to Defendants' Motion for Surnrnary Judgment, pp 3-4.

[25] *Id.*

[26] November 19, 1996 Hearing Transcript ("Tr."), p. 300.

permit. There is no evidence that the Mayor had any authority to carry out these administrative tasks or that he had a hand in facilitating them.

In short, the undisputed facts show that City Council approved the site plan over the Mayor's opposition, that the Clerk properly submitted the referendum petition to the Board of Elections, and that the City properly refused to issue the building permit to Buckeye.[27] Because the Developers have failed to raise a material factual question on the issue of intentional racial discrimination, the equal protection is dismissed as a matter of law.

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[27] These facts are completely distinguishable from *United States v. City of Birmingham*, 538 F .Supp. 819 (E.D. Mich. 1982)., aff'd 727 F.2d 560(6th Cir. 1984}wherein the City of Birmingham took active steps to subvert a similar project, such as putting contractual roadblocks in the way of Council approval, holding a voluntary referendum requested by voters who were clearly opposed to the project for racial reasons, and then honoring the inevitable outcome. Here, City Council approved the site plan by ordinance, which the Mayor did not veto. The City of Cuyahoga Falls later honored a mandatory referendum permitted under City Charter. (Although *Birmingham* involved a discrimination claim brought under the Fair Housing Act, the standards for proving intentional discrimination under that Act and the Equal Protection Clause are the same.)

C. Fair Housing Act

Under 42 U.S.C. 3604(a), it is unlawful "to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." *Id*. This section applies to municipalities. *United States v. City of Parma, Ohio*, 661 F.2d 562 (6th Cir. 1981). Plaintiffs argue that the City intentionally discriminated against families and racial minorities, and that the referendum was discriminatory because it had a disparate impact on racial minorities and families with children.

i. Intent to Discriminate

There is no distinction between the elements of a housing discrimination claim, based on discriminatory intent, under the Equal Protection Clause or the Fair Housing Act. See, *e.g., Village of Arlington Heights*, 429 U.S. at 265-66,97 S.Ct. at 563. The Court finds that the plaintiffs have provided no evidence that City officials discriminated against families by submitting the petition to the Board of Elections or denying the permit. For this reason and the reasons set forth with respect to intentional racial discrimination under the equal protection claim, *supra*, pp. 10-14 , the Court finds that the Developers have failed to raise a material factual issue with respect to intentional discrimination under the Fair Housing Act.

ii. Disparate Impact

Under limited circumstances, a violation of the Fair Housing Act can be established by showing discriminatory impact without a showing of discriminatory intent. *Metropolitan Housing Development Corp. v. Village of*

Arlington Heights, 558 F.2d 1283, 1290(7th Cir. 1977). The Court must consider three factors:

> (1) the strength of the plaintiffs showing of discriminatory effect;
>
> (2) the defendant's interest in taking the action complained of; and
>
> (3) the plaintiffs goal, *i.e.*, whether it is to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.
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> *Arthur v. Toledo*, 782 F.2d 565,575 (6th Cir. 1986).

The third factor requires the Court to examine the goals of the plaintiffs in bringing this case. The Court will not question the motives of the Developers in litigating this action. Their perseverance in vindicating their rights under Ohio law can only be commended.

The first factor requires the Court to assess the discriminatory effect of the referendum. There is no doubt that the repeal of the Ordinance approving development of a low income housing site had a disparate effect on racial minorities and families with small children. The mission of the Buckeye Community Foundation is to provide affordable housing to persons in low income brackets. Racial minorities and families with small children constitute a significant portion of that bracket. If this fact alone was sufficient to prove a disparate impact claim, however, every denial of a permit to construct low income housing would necessarily violate the Fair Housing Act.

Regarding the second factor, the importance of the

referendum as a means of democratic process is beyond question.

The reservation of such power is the basis for the town meeting, a tradition which continues to this day in some States as both a practical and symbolic part of our democratic processes. The referendum, similarly, is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies. The practice is designed to 'give citizens a voice on questions of public policy.'

Eastlake v. Forest City Eng., Inc., 426 U.S. 668,672-73 (1976) (citations omitted). Given the strong policy considerations underlying referenda, the Sixth Circuit has held that the discriminatory effect of a referendum cannot establish a violation of the Fair Housing Act "absent highly unusual circumstances." *Arthur*, 782 F.2d at 575.

The Court has ruled that submission of the referendum petition to the Board of Elections and denial of the building permit were ministerial acts that were mandated by law. The Developers have failed to establish a material factual issue regarding the discriminatory intent of the City officials. Although plaintiffs have provided evidence that supporters of the referendum made discriminatory comments at organizational meetings, the undisputed evidence shows that over 20,000 people voted on the referendum. Again, the bigoted comments of a few voters cannot be imputed to the entire electorate or to the City. *Arthur*, 782 F .2d at 573- 74 (citations omitted). The Court finds that the Developers have failed to establish the presence of highly unusual circumstances.

Given the disparate effect of the referendum and the good

intentions of the Developers in pursuing their legal rights, it is the utter failure of plaintiffs to establish highly unusual circumstances on the part of the City that requires dismissal of the disparate impact claim under the Fair Housing Act.

III. CONCLUSION

Today, it is clear that City Council's approval of the plaintiff's proposed site plan could not be put to popular vote under the Ohio Constitution, and that plaintiff's project should have gone forward in 1996. However, plaintiffs have failed to show that the defendants' conduct violated any of the federal claims alleged. Accordingly, summary judgment is granted in defendants' favor on all counts of the complaint.

IT IS SO ORDERED.

Dan Aaron Polster
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT,
N.D. OHIO,
EASTERN DIVISION
June 20, 1997

No. 5:96 CV 1458

BUCKEYE COMMUNITY HOPE FOUNDATION, et al.,
Plaintiffs,

v.

CITY OF CUYAHOGA FALLS, et al.,
Defendants.

Diane E. Citrino, Housing Advocates, Inc., Cleveland, OH, Edward G. Kramer, Kramer & Nierman, Cleveland, OH, for Buckeye Community Hope Foundation, Cuyahoga Housing Partners, Inc., Buckeye Community Three L.P., Fair Housing Contact Service.

Virgil E. Arrington, Jr., City of Cuyahoga Falls, Department of Law, Cuyahoga Falls, OH, for City of Cuyahoga Falls, Gregg Wagner, Gerald M. Dzurilla.

Virgil E. Arrington, Jr., City of Cuyahoga Falls, Department of Law, Cuyahoga Falls, OH, Jack Morrison, Jr., E. Marie Wheeler, Steven W. Mastrantonio, Amer,

Cunningham, Brennan, Akron, OH, for Don Robart.

William E. Schultz, Office of the Prosecuting Attorney, Akron, OH, for Summit County Bd. of Elections.

Roger Gupta, Munroe Falls, OH, pro se.

ORDER

SAM H. BELL, District Judge.

The above-captioned matter came before this Court on the filing of a Complaint by Plaintiffs Buckeye Community Hope Foundation ("Buckeye"), Cuyahoga Housing Partners, Inc., Buckeye Community Three L.P., and the Fair Housing Contact Service, in which they requested injunctive relief from what they alleged to be violations of rights guaranteed by the Constitution's Due Process and Equal Protection Clauses, as well as violation of those rights protected by federal fair housing laws. On November 19-21, 1996, the Court conducted a hearing and took evidence regarding Plaintiffs' request for a preliminary injunction. Ultimately, the Court approved an injunction stipulated to by the parties which enjoined the Defendant Summit County Board of Elections from certifying the results of a referendum concerning the Plaintiffs' ability to build low-income housing on land in Cuyahoga Falls. (Docket # 68.) However, because the Court found there to be no showing of irreparable harm to Plaintiffs, their request for an injunction ordering the Defendant City of Cuyahoga Falls to issue building permits was denied. (Docket # 78.) In the Order denying Plaintiffs' preliminary injunction request, the Court deferred consideration of the merits of the underlying causes of action, concluding that such consideration would be more

appropriately addressed after evaluating the Defendants' motions for summary judgment. The Court then referred those motions to Magistrate Judge James D. Thomas for a report and recommendation.

Presently before the Court is the report of the Magistrate, in which he recommends that this Court grant the motions for summary judgment filed by Defendants the City of Cuyahoga Falls, Mayor Don Robart, Clerk of City Council Gregg Wagner, and Chief Engineer Gerald M. Dzurilla. While Defendants largely agree with the Magistrate's analysis or conclusions, Plaintiffs' objections are numerous and weighty. (*See* docket # s 88, 89, 90.) Since the issuance of the Magistrate's Report and Recommendation, this Court requested the parties to address three questions raised by their briefs and objections, (docket # 94), and they readily complied (docket # s 95 & 98). The issues having thus been well-framed, the Court now issues its opinion.

I. Background.[1]

There are two areas of background relevant to the consideration of the pending motions: (1) the facts leading up to the proposed development, referendum and filing of this action; and (2) the procedural context of this action. The two areas are discussed below. Initially, however, one procedural matter warrants an introduction here.

As mentioned above, this Court conducted a three day hearing on Plaintiffs' motion for preliminary injunction in

[1] This Background section is taken, with only minor changes, from the thorough and well-documented corresponding section of the Magistrate's report. (Docket # 86, part II, at 2-15.)

November of 1996. This was the second hearing on Buckeye Community Hope Foundation's request for injunctive relief; a preliminary injunction hearing was also held in the state action. Plaintiffs' motion for injunctive relief filed in this Court was denied on December 13, 1996. (Docket # 78.) On the motion of Plaintiffs, the transcript of those proceedings has been accepted for consideration in connection with the pending motions for summary judgment. (*See* Order of January 22, 1997, Docket # 84.) The Magistrate relied on portions of the three volume transcript in his report, and this Court will also consider that evidence insofar as it is relevant to the motions now before the Court.

Plaintiff Buckeye Community Hope Foundation ("Buckeye Community Foundation") is a not-for-profit 501(c)(3) corporation. (Hearing Transcript, November 19, 20, and 21, 1996 ("Tr.") at pp. 11-13.) It has as its purpose the development of affordable housing through the use of low income housing tax credits. (*Id.*) Mr. Boone is the President of the Board of Trustees for Buckeye Community Foundation. (Tr. at p. 11.)

Prior to the development of the complex in question here, Buckeye Community Foundation developed at least four other affordable housing complexes in Ohio. (Tr. at p. 15.) As outlined at the hearing before this bench by Mr. Boone and the Executive Director for Buckeye Community Foundation, Mr. P. Barno, Buckeye Community Foundation acts as a developer for each project. (Tr. at p. 389.) For each project, a separate limited partnership is formed as the investment vehicle to sell the tax credits. In this case, the specific limited partnership is Plaintiff Buckeye Community Three, L.P. ("Buckeye Three Limited"). (Tr. at p. 23.) The limited partnership is the owner of the land and, once it is completed,

the development. As the project is developed, Buckeye Community Foundation advances fees and expenses until all the financing, including the tax credits, are finalized.[2] Once the complete financial package is arranged and finalized, Buckeye Community Foundation is reimbursed for its expenses in developing the project. Buckeye Community Foundation also receives a "developer's fee" for its services. In this case, the expected fee is $175,000.00. (Boone Dep. at p. 120; Tr. at p. 381.)

To protect each development and its investors, Buckeye Community Foundation forms a separate corporation to act as the general partner for the limited partnership. (Tr. at pp. 22-23.) In this case, Plaintiff Cuyahoga Partners, Inc. ("Cuyahoga Partners"), a for-profit corporation, was formed to serve as the general partner of Buckeye Three Limited.[3] (Tr. at p. 23.) Mr. Boone is the president of Cuyahoga Partners. (Boone Dep. at pp. 6-7.) Buckeye Community Hope Foundation is a fifty-one percent owner of Cuyahoga Partner, and the, other forty-nine percent is owned by Little Country Community, Inc., another 501(c)(3) corporation. (Tr. at p. 396.) Thus, Buckeye Community Foundation controls Cuyahoga Partners which in turn controls Buckeye

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[2] For example, in this case the $10,000 loan commitment paid to the bank by Buckeye Three Limited was advanced by Buckeye Community Hope Foundation. (Tr. at p. 397.)

[3] The initial limited partners were RLJ Management Company and/or Steven Boone individually. (Tr. at p. 398.) RLJ Management Company is "a management company that manages affordable housing in Ohio and elsewhere." (Boone Dep. at p. 7.) There is an "understanding" that RLJ Management Company would manage the complex if it were built. (Tr. at p. 398.) RLJ Management is owned by Mr. Boone. (*Id.*)

Three Limited.[4] (Tr. at pp. 23, 389-390.)

Turning to the events leading to the underlying dispute, Mr. Boone testified that he first contacted the Mayor for the City of Cuyahoga Falls, Don Robart, in the summer of 1995 about the possibility of developing a low income housing complex in Cuyahoga Falls.[5] Mr. Boone testified that Hearing Exhibit 23 represents a letter from Buckeye Community Foundation to Mayor Robart dated June 7, 1995. In the letter, Buckeye Community Foundation expressed an interest in developing the land "under the low income housing tax credit program." (Tr. at pp. 20-21.) Mr. Boone indicated that this letter was sent before the purchase of the land for the project. (Tr. at p. 21.) According to Mr. Boone, the Mayor expressed no problems about the proposed development at that time. (*Id.*)

The real property, located on Pleasant Meadow Boulevard, was purchased on June 12, 1995. (Complaint at ¶ 13.)

Mr. Boone testified that he started working with Cuyahoga Falls Planning Director, Louis Sharpe, in late August/September of 1995 on the details of the development. (Tr. at pp. 30-31.) The financing for the project was secured in November of 1995. (Tr. at p. 21.)

In January, 1996, Buckeye Three Limited, filed an application for a "site plan review" for the seventy-two unit apartment complex in the City of Cuyahoga Falls.

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[4] Because of the commonality among these parties, at times they are referred to collectively as "Plaintiff Developers."

[5] Don Robart is named as a defendant in this action both in his individual and official capacities.

(Complaint at ¶ 15.)

On February 21, 1996, the "site plan" was submitted for approval at a meeting of the Planning Commission for Cuyahoga Falls. (Complaint at ¶ 17; Tr. at p. 33.) In connection with the Planning Commission's meeting, Planning Director Sharpe prepared a Staff Summary of the site plan. (*See* Hearing Exhibit 11; Tr. 128.) This summary recommended approval of the site plan subject to approximately nine conditions agreed to by Mr. Boone. One of the conditions required the developers to erect a fence on one side of the property before the building permit for the apartment complex could issue.

The site plan, including the conditions, was unanimously approved by the Planning Commission at the February 21, 1996 meeting.[6] (Complaint at ¶ 17; Tr. at p. 35.) The Planning Commission's recommendation then had to be submitted to and approved by City Council. (*Id.*) Mayor Robart did not attend the February 21, 1996, Planning Commission meeting. (Tr. at pp. 72-73.)

On March 4, 1996, the Planning Commission's recommendation on the site plan was addressed at a City Council meeting. (Tr. at p. 35.) Mayor Robart attended this meeting. (Tr. at p. 36.) According to Mr. Boone, Mayor Robart "came out against" the project during this meeting and suggested that the issue be tabled. (Tr. at p. 39-40.) The

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[6] Hearing Exhibit 11 sets forth the conditions prerequisite to the issuance of the building permit as approved by the Planning Commission and as adopted by City Council. (Tr. at p. 90.)

issue was tabled.[7] (Tr. at p. 40.)

Another meeting of City Council was held on March 18, 1996. (Tr. at p. 40.) From a review of the materials filed in connection with the motions, one can conclude that this meeting was long and emotional. The minutes reflect that the meeting lasted from 6:15 p.m. until 8:45 p.m. and that several residents expressed their concerns over the development of the complex. Mayor Robart attended the March 18, 1996 meeting and expressed his views in a lengthy statement. (Hearing Exhibit 24 at pp. 12-14.)

According to Mr. Boone, Mayor Robart recommended rejecting the project at the March 18, 1996 Council meeting. (Tr. at p. 43.) The issue was tabled again. Mr. Boone testified, "I believe they said the reason was because they wanted the law department to provide a legal opinion if there was any possible reason, the way it was put, that they could turn us down legally." (Tr. at p. 43.) Mr. Boone acknowledged that he raised the Fair Housing Act at the March 18, 1996 meeting. (Tr. at p. 60; Boone Dep. at p. 16.)

Another Council meeting occurred on April 1, 1996, and the site plan was approved by vote of six to three, with two abstentions. (Complaint at ¶ 19; Tr. at p. 43.) The City Council's approval was expressed in the form of Ordinance No. 48-1996. Ordinance No. 48-1996 states, in pertinent

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[7] Mr. Boone indicated that while he was not aware of any referendum being considered, he recalled the word being used by the City Law Director at either the March 4 or March 18 City Council meeting. (Tr. at pp. 41-42.) Mr. Boone testified that the word referendum "went right over my head" and he did not understand what a referendum was until April. (*Id.*)

part:

> That this City Council approves the plan for development of land situated in an R-17 Medium Density Multiple Family zoning district in accordance with such district and zoning regulations as stipulated in the Codified Ordinances of the City of Cuyahoga Falls and as approved by the Planning Commission as per the plans and stipulations contained in Planning Commission File P-6-96-SP.
>
> (Hearing Exhibit # 8, Section 1.)

Mr. Boone testified that they applied for the building permit about two days after the site plan was approved. (Tr. at p. 44.) Upon direct questioning by the Court, Mr. Boone stated that the application was made on either April 3 or 4. (*Id.*) The complaint alleges that the building permit was sought on or about April 5, 1996. (Complaint at ¶ 29.)

Mr. Boone testified that they received the building permit for the fence in April, 1996. (Tr. at pp. 46-48.) Mr. Boone testified that work on the fence did not begin "because it became pretty obvious that we are in a fight, and I wasn't about to--first of all, we don't have the funds to put up a $70,000 fence. If we know we are going to receive with assurity the building permit to build the rest of the project, I--that's basically the reason." (Tr. at p. 48.) Mr. Boone further stated that he did not proceed with building the fence because "the rumors of a referendum were very prevalent." (Tr. at p. 92.) He testified, "I felt the reasonable thing to do was to delay the construction of the fence until I was assured we were going to get a building permit." (Tr. at p. 92.)

Parallel to the site plan approval process, a referendum

effort was proceeding. (*See* Complaint at ¶ 24.)

Mr. Lee Minier is a life long resident of Cuyahoga Falls, Ohio. (Tr. at p. 266.) He was called by Plaintiffs to testify at the preliminary injunction hearing. Mr. Minier testified that Hearing Exhibit 19 is a notice for meeting on Tuesday, April 9, 1996 to discuss "taking the ISSUE OF A 72 UNIT HOUSING DEVELOPMENT ON PLEASANT MEADOW BLVD. to the vote of the people of Cuyahoga Falls in November." (Hearing Exhibit 19) (upper case print in original) (Tr. at p. 278-279.) The organizing group, as identified on Hearing Exhibit 19, was the "Citizens for the Preservation of Voters Rights." (*See* Exhibit 19.)

Mr. Minier attended the April 9, 1996 meeting. The Mayor also attended the meeting. (Tr. at p. 279.) The Mayor spoke at the meeting and stated that he supported the referendum effort. (*Id.*) According to Mr. Minier, no City of Cuyahoga Falls officials were asked to sign the referendum petitions. (*Id.*)

Mr. James Kuzmik, a "tester" for the Fair Housing Advocates Association, also attended the April 9, 1996 meeting. (Tr. at p. 291.) According to Mr. Kuzmik, the director of Fair Housing Advocates Association called him and asked him to attend the meeting.[8] (*Id.*) Mr. Kuzmik testified that the referendum process was discussed at this meeting. Mr. Kuzmik was asked, "were there any statements made by members of the Citizens for the Preservation for Voter [Rights] dealing with children?" Mr. Kuzmik said yes.

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[8] Mr. Kuzmik is not a member of Fair Housing Contact Services. (Tr. at p. 291.) Fair Housing Advocates Association is a distinct entity separate and apart from Plaintiff Fair Housing Contact Service.

(Tr. at p. 293.) Mr. Kuzmik said he did not recall any one person leading the meeting. (Tr. at p. 296.) On cross examination, Mr. Kuzmik stated that he did not hear Mayor Robart make any discriminatory remarks about African Americans or children at the April 9, 1996 meeting.[9] (Tr. at p. 300.)

On or about April 29 or 30, 1996, a referendum petition was submitted to the Clerk of Council, Gregg Wagner.[10] (Complaint at ¶ 25; Wagner Affidavit at ¶ 5.) The Board of Elections approved the referendum petition on May 1, 1996. (Complaint at pp 25 and 26; Wagner Affidavit at ¶ 5.)

On May 1, 1996, the state action was filed to enjoin the referendum process under Ohio law. The case was captioned: *Buckeye Community Hope Foundation, et al. v. City of Cuyahoga Falls, et al.*, Case No. CV96-05-1701 (Summit County) (Murphy, J.). The named plaintiffs were Buckeye Community Foundation, Cuyahoga Partners, and Buckeye Three Limited, three of the four named plaintiffs in this action. (See "Complaint for Temporary Restraining Order Declaratory Judgment Injunctive Relief," Docket # 33, Exhibit C.) The state court complaint named as defendants: (1) City of Cuyahoga Falls; (2) Cuyahoga Falls City Council; (3) Gregg Wagner, Clerk of City Council, City of Cuyahoga Falls; and (4) Summit County Board of Elections. (Docket # 33, Exhibit C.) With the exception of the Cuyahoga Falls City Council, the same defendants have been named in this action.

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[9] Mr. Kuzmik's handwritten notes taken during the meeting are at Hearing Exhibit 32. (Tr. at p. 298.)

[10] Mr. Wagner is named in this lawsuit as a defendant in his official capacity as the Clerk of Council.

On May 15, 1996, Judge Murphy conducted a hearing on plaintiffs' request for preliminary injunction. (Docket # 33, Exhibit F.) At the hearing, plaintiffs presented the testimony of three witnesses: (1) Mr. Boone; (2) Joseph James Orel, President of JJO Construction, the contractor for the project; (Docket # 33, Exhibit F, p. 13); and (3) Roy Lowenstein, a representative of Ohio Capital Corporation for Housing. (Docket # 33, Exhibit F, p. 17.) Mr. Boone and Mr. Orel also testified at the hearing in November, 1996.[11] (Tr. at pp. 11-106; pp. 109-121.) The plaintiffs in that action were represented by Edward G. Kramer, who represents Plaintiffs in this action as well. (Docket # 33, Exhibit C.)

On May 31, 1996, Judge Murphy denied the plaintiffs' motion for preliminary or permanent injunction.[12] (Docket #

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[11] Several other witnesses testified at the hearing including Louis Sharpe (Tr. at pp. 121-158), Sandra Montgomery (Tr. at pp. 158-164), Crystal Williams (Tr. at pp. 165-169), Kathy Ronca (Tr. at pp. 169-180), Julia Neal (Tr. at pp. 180-185), Gerald Dzurilla (Tr. at pp. 186-198), Dr. Mark Sailing (Tr. at pp. 201-252), George Potts (Tr. at pp. 253-266), Lee Minier (Tr. at pp. 266-288), James Kuzmik (Tr. at pp. 289-300), Don Robart (Tr. at pp. 301-338), and Peter Gilbertson Barno (Tr. at pp. 359-404.) The testimony of each witness has been read and considered by the undersigned. The relevant testimony is discussed *infra* to the extent necessary.

[12] Plaintiffs appealed Judge Murphy's decision and on December 11, 1996, the Ninth Appellate District affirmed the decision of the trial court. On March 26, 1997, the Ohio Supreme Court allowed Plaintiffs' appeal, but as of the time of this order, no

33, Exhibit B.) The decision and judgment was "on the merits." (Docket # 33, Exhibit F, pp. 48-49; *see also,* Attachment to Docket # 77--Ninth Appellate District's December 11, 1996 opinion at p. 3 ("The parties agreed to consider the hearing as a trial on the merits of the case.")).

On June 20, 1996, Mr. P. Gilbertson Barrio, Buckeye Community Foundation's Executive Director wrote to the City of Cuyahoga Falls and renewed his request for issuance of a building permit. (Hearing Exhibit # 16.) On June 26, 1996, Mr. Gerald M. Dzurilla, the City Engineer for Cuyahoga Falls, sent a letter to Mr. Barno and indicated that he could not issue the building permit in light of the pending referendum.[13] (Complaint at ¶ 31; Hearing Exhibit # 15.)

Plaintiffs filed the present action on July 5, 1996, naming as Plaintiffs the three plaintiffs in the state court action, plus one new plaintiff, the Fair Housing Contact Service. The Defendants in this action are: (1) City of Cuyahoga Falls; (2) Don Robart, in his individual and official capacity as Mayor of the City of Cuyahoga Falls; (3) Gregg Wagner, in his official capacity as Clerk of City Council; (4) Summit County Board of Elections; and (5) Gerald M. Dzurilla, in his official capacity as Chief City Engineer. (Docket # 1.) The new Defendants, i.e., those not named in the prior state suit, are Mayor Robart in his individual and official capacity, and Mr. Dzurilla in his official capacity.

In contrast to the complaint filed in state court, the complaint filed in this Court is based upon federal law. The

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opinion has been rendered.

[13] Gerald Dzurilla is named in this lawsuit as a defendant in his official capacity as "Chief City Engineer."

Plaintiffs allege violations of 42 U.S.C. §§ 3601 *et seq.*, 3604, and 3617, 42 U.S.C. §§ 1981 and 1982 (Docket # 1, ¶ 37); the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983 (pp 39, 44); and the Equal Protection Clause of Fourteenth Amendment and 42 U.S.C. § 1983 (¶ 41). Plaintiffs ask this Court to grant them declaratory judgment, to grant an injunction ordering the Defendant City and its officers and agents to issue building permits to the Plaintiff Developers, to enjoin the Defendants from imposing additional burdens on the planning and construction of the development, and to order Defendants to pay compensatory and punitive damages and costs. (Docket # 1, part VI, pp 2-7.) Originally, the complaint also sought to enjoin the Defendants from placing the referendum on the ballot, (docket # 1, part VI, ¶ 3), however, the referendum has already been placed on the ballot and voted upon by the electors of Cuyahoga Falls, therefore that prayer for relief is moot and no longer before the Court.[14]

II. Standard of Review.

The Court of Appeals for the Sixth Circuit has summarized the standard of review governing motions for summary judgment under Federal Rule of Civil Procedure 56 as follows:

> Summary judgment is appropriate where "there is no genuine issue of material fact ... and the moving party is entitled to judgment as a matter of law." ... [The] court must view all facts and inferences drawn

[14] Indeed, Plaintiffs never seriously advanced that prayer for relief; they did not file their preliminary injunction motion until the week after the election, November 14, 1996. (Docket # 56.)

> therefrom in the light most favorable to the non-moving party.

The moving party has the burden of conclusively showing that no genuine issue of material fact exists. Nevertheless, in the face of a summary judgment motion, the nonmoving party cannot rest on its pleadings but must come forward with some probative evidence to support its claim.

"By its very terms, this standard provides that the existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." The dispute must be genuine and the facts must be such that if they were proven at trial, a reasonable jury could return a verdict for the nonmoving party. If the disputed evidence "is merely colorable or is not significantly probative, summary judgment may be granted."

LaPointe v. United Autoworkers Local 600, 8 F.3d 376, 378 (6th Cir.1993) (citations omitted). With this standard in mind, the Court will address the Defendants' present motion.

III. Res Judicata.

All Defendants argue that the Plaintiffs' instant causes of action are barred by the doctrine of res judicata. As the Magistrate Judge explained, the doctrine of res judicata or claim preclusion "refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of the determination that it should have advanced in an earlier suit." (Docket # 86, at 17 (quoting *Barnes v. McDowell,* 848 F.2d 725 (6th Cir.1988), *cert. denied,* 488 U.S. 1007, 109 S.Ct. 789, 102 L.Ed.2d 780 (1989)).) The Supreme Court in *Migra v. Warren City School District,* 465

U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984), applied res judicata to a claim, such as some of those now before this Court, brought pursuant to Section 1983. After having pursued causes of action for breach of contract and wrongful interference with her employment contract in state court, the plaintiff, Ms. Migra, filed a Section 1983 action contending the violation of her fundamental rights as protected by the First Amendment. The Supreme Court had little difficulty determining that Ms. Migra's federal cause of action was precluded by her earlier suit in state court. In short, the Court held that federal courts must give full faith and credit to state court judgments including the preclusive effect of those judgments. *Id.*

Thus, in the instant case, this Court must afford the prior state court judgment the same preclusive effect that an Ohio Court would afford it. *Barnes,* 848 F.2d at 730. Ohio has adopted the modern version of the doctrine of res judicata, stating "that a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Township,* 73 Ohio St.3d 379, 382, 653 N.E.2d 226 (1995). The *Grava* Court further explained that for two suits to be based upon the same transaction, there must be a "common nucleus of operative facts." *Id.* If the suits share a common nucleus of operative facts, then a plaintiff cannot bring the second action *"even though [he] is prepared ... (1) To present evidence or grounds or theories of the case not presented in the first action, or (2) To seek remedies or forms of relief not demanded in the first action."* *Id.* at 383, 653 N.E.2d 226.

Applying that law to the matter now before the Court, there is evidence that both this and the Plaintiffs' original state

action derive from at least some of the same operative facts. As the Magistrate noted, fifteen paragraphs of the complaint in the instant case were taken almost verbatim from the complaint in the previous state action. Those paragraphs explain, among other things, the mission of the Plaintiff Foundation, the zoning of the property in question, and the procedure followed by the Plaintiffs and the obstacles encountered by them in their attempt to realize their goal of building the low-income housing project. (*See* Complaint pp 12, 14-20, 23-27.) Still, as Plaintiffs suggest, notable differences can be found in paragraphs 13, 24, 28, and 29. Normally, it would be for this Court to determine whether the factual differences as alleged in those paragraphs are of such disparate substance that the federal causes of action arise from a different nucleus of operative facts.

The Court finds, however, that Defendants' claim of res judicata turns instead on a distinctly different line of analysis. In *Jamestown Village Condo. Owners Association v. Market Media Research, Inc.,* 96 Ohio App.3d 678, 685, 687, 645 N.E.2d 1265 (1994), the Cuyahoga County Court of Appeals acknowledged and adopted the declaratory judgment exception to the general rule of claim preclusion. In the *Jamestown* Court's words, "a declaratory judgment [brought pursuant to O.R.C. § 2721] is not res judicata on an issue or claim not determined thereby even though it was known and existing at the time of the original action." *Id.* at 685, 645 N.E.2d 1265. *See also, Ketchel v. Bainbridge Township,* 79 Ohio App.3d 174, 177, 607 N.E.2d 22 (Geauga Cy. 1992) ("a declaratory action determines only what it actually decides and does not have a claim preclusive effect on other contentions that might have been advanced") (quoting Restatement of Law 2d, Judgments Section 33 (1982)). The

rationale for this exception is grounded in the reasons for allowing actions for declaratory judgment, themselves. As explained in the Restatement (Second) of Judgments,

> Historically, an action at law generally could not be maintained unless the defendant had already violated a duty owed to the plaintiff, and the purpose of the action was to redress the wrong already committed. On the other hand, in some circumstances a suit in equity might be maintained to prevent the commission of a threatened wrong and, even though no wrong had been committed or threatened, to secure a determination--which might well be called a declaration--of the rights of the parties.... (Section 33, Comment a.)
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> * * * * * *
>
> When a plaintiff seeks solely declaratory relief, the weight of authority does not view him as seeking to enforce a claim against the defendant. Instead, he is seen as merely requesting a judicial declaration as to the existence and nature of a relation between himself and the defendant. The effect of such a declaration, under this approach, is not to merge a claim in the judgment or to bar it. Accordingly, regardless of outcome, the plaintiff or defendant may pursue further declaratory or coercive relief in a subsequent action.... A declaratory action is intended to provide a remedy that is simpler and less harsh than coercive relief, if it appears that a declaration might terminate the potential controversy. (Section 33, Comment c.)

In other words, an action for declaratory judgment is intended to be a mechanism by which the parties can

potentially avoid full-fledged litigation on a number of claims, by initially focusing on a single case-dispositive issue. It would defeat this purpose if a court were to bar subsequent actions based on different legal theories due to the res judicata effect of an initial declaratory action.

Nonetheless, as the Court has noted above, in 1995 the Ohio Supreme Court adopted the "modern" view of the doctrine of res judicata. *Grava v. Parkman Township*, 73 Ohio St.3d 379, 653 N.E.2d 226 (1995). One might pose the question, therefore, if an exception to the 1994 version of res judicata would survive the implementation of the modern 1995 rule. The Court holds that it does.

First of all, the Court notes that there was very little which was new in the *Grava* Court's holding.[15] Granted, before the opinion in *Grava*, Ohio's seminal case on res judicata, *Norwood v. McDonald*, 142 Ohio St. 299, 52 N.E.2d 67 (1943) (syllabus ¶ 2), stated the now-outdated approach which allowed subsequent suits for different cause of actions, but that old approach has not been followed by the Ohio Supreme Court in recent years. As a matter of fact, the Ohio Supreme Court shifted back to the "modern" view at least by 1986 when it issued *Rogers v. City of Whitehall*, 25 Ohio St.3d 67, 69, 494 N.E.2d 1387 (1986) ("an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were *or might have been*

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[15] Interestingly, the Supreme Court of Ohio had stated the "modern" view of the current rule as early as 1922, that is, in that year the Court acknowledged that res judicata barred the litigation of any material issue which the parties "might have litigated" in their earlier adjudication. *Schram v. City of Cincinnati*, 105 Ohio St. 324, 329, 137 N.E. 868 (1922).

litigated in a first lawsuit."). Indeed, the *Grava* opinion explains as much and cites to both the *Rogers* opinion and its opinion in *National Amusements, Inc. v. Springdale*, 53 Ohio St.3d 60, 62, 558 N.E.2d 1178, 1180 (1990), as examples. The most reasonable explanation for the holding in its syllabus in *Grava* is that the Ohio Supreme Court realized that this modern understanding of the law had not yet been reduced to a syllabus so as to conform with that unique custom of Ohio law. A review of *Grava* and its predecessors reveals that the "modern" approach to res judicata has been taken since the mid-1980s. It follows that the declaratory judgment exception to res judicata applied by the *Jamestown* Court in 1994, was recognized and adopted within the context of the "modern rule."

Another reason for this Court to conclude that Ohio recognizes the declaratory judgment exception is that the "modern rule" which was expressly adopted by the Ohio Supreme Court in *Grava* was taken from the same Restatement upon which the *Jamestown* Court relied in finding the declaratory judgment exception to res judicata. *See Grava*, syllabus (adopting 1 Restatement of the Law 2d, Judgments (1982), Section 24-25); *Jamestown*, 96 Ohio App.3d at 685, 645 N.E.2d 1265. Furthermore, the Court notes that the Ohio Supreme Court declined to review the holding in *Jamestown* just seven months before issuing its opinion in *Grava*. While this Court does not view the denial of review as an express approval of the *Jamestown* holding, it is educational that the same court which expressly adopted the modern view of res judicata thought that an application of an exception to that doctrine was unworthy of review.

Although this Court disagrees with the Defendants' conclusions, it acknowledges Defendants' argument that there

is Ohio law which supports their view that there is no declaratory judgment exception to res judicata in Ohio. Specifically, Defendants contend that the Ohio Supreme Court decided this issue in *National Amusements v. Springdale*, 53 Ohio St.3d 60, 558 N.E.2d 1178 (1990). In that case, the Ohio Supreme Court considered an appeal from a theater owner who brought an action challenging the constitutionality of a tax on cinema admissions. Because the theater owner had brought a nearly identical cause of action five years earlier (albeit prior to a United States Supreme Court opinion which may have changed the outcome of the case), the defendant argued that the second suit was barred by res judicata.

The Ohio Supreme Court began its analysis of the case by recognizing that both causes of action requested an identical declaratory judgment and that the only difference in the second cause of action was an additional clause demanding that the city remit the taxes paid since the first law suit. *Id.* at 61 n. 1, 62, 558 N.E.2d 1178 (citing n. 1). Then the Court noted the law of res judicata as explained in *Rogers* which emphasizes that a party has a duty to bring all claims which "were *or might have been* litigated in a first lawsuit." *Id.* at 62, 558 N.E.2d 1178. Because the wording of the causes of action in both lawsuits was identical and the additional claim for relief could have been brought in the initial suit, the Court found plaintiff's claim barred by res judicata. *Id.*[16]

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[16] The Court then devoted the bulk of the opinion to the rejection of the idea that a change in the controlling Constitutional law could justify exempting a case from the effects of res judicata. *National Amusements v. Springdale*, 53 Ohio St.3d at 62-64, 558 N.E.2d 1178.

This analysis by the *National Amusements* Court does not impact this Court's consideration of the existence of a declaratory judgment exception for two complimentary reasons. First, although the initial cause of action in *National Amusements* was one for declaratory judgment, the declaratory judgment exception was not raised by the parties in the second cause of action; it was not before the Court and the Court did not consider it. Second, even if that exception had been raised, it would not have been applied by the Court in that context. The declaratory judgment exception to res judicata does not allow a plaintiff to bring successive *identical* declaratory judgment actions as the *National Amusements* plaintiff was attempting. Rather, the declaratory judgment exception is a product of the declaratory action itself, the purpose of which is to allow parties to receive a relatively expedient opinion on one issue which could control the outcome of the case. If the declaratory device functions perfectly, the parties need not reach other, potentially meritorious causes of action arising out of the same circumstances as the first. The usefulness of the declaratory judgment itself would be eliminated if we were to allow the doctrine of res judicata to bar subsequent suits brought based on *different* legal theories. However, no purpose would be served by allowing a plaintiff to bring a second suit on the *same* legal theory. It follows that in *National Amusements,* the Court was undoubtedly correct to ignore the declaratory judgment exception because the second cause of action which that Court was considering was brought on a legal theory which was identical to, rather than different from, the first suit filed by that plaintiff. *See also Shaper v. Tracy,* 76 Ohio St.3d 241, 667 N.E.2d 368 (1996) (considering suits based on identical legal issues). The *National Amusements* decision, therefore, sheds little light on the viability of the declaratory

judgment exception to the doctrine of res judicata in Ohio.

Ultimately, based on the Cuyahoga Court of Appeals decision in *Jamestown* and the Ohio Supreme Court's willingness to rely on the Restatement (Second) of Judgments, the Court concludes that Ohio does recognize the declaratory judgment exception to the rule of res judicata. In the instant case, a review of the original state court complaint, (docket # 33, ex. C), reveals that the only issue of law raised was the Defendants' ability under state law to allow a referendum on a particular *administrative* ordinance passed by the Cuyahoga Falls Council. None of the federal law causes of action now advanced in the instant suit were discussed. Therefore, as long as the initial state court action was one for declaratory judgment, it should fit within the res judicata exception.

Having thus determined that in Ohio, "a declaratory action determines only what it actually decides and does not have a claim preclusive effect on other contentions that might have been advanced," *Ketchel v. Bainbridge Township,* 79 Ohio App.3d 174, 177, 607 N.E.2d 22 (Geauga Cy. 1992) (quoting Restatement of Law 2d, Judgments (1982)), and having determined that the Plaintiffs' original complaint dealt solely with a question of law not raised in the Plaintiffs' federal complaint, the Court must next determine whether Plaintiffs' original cause of action was declaratory in nature and thus within the exception to the rule of res judicata. Defendants argue that the original state complaint requested coercive relief which changed the nature of the cause of action to something other than a simple declaratory action.

Plaintiffs' original state cause of action was entitled a "Complaint for Temporary Restraining Order[,] Declaratory Judgment[, and] Injunctive Relief." (Docket # 33, ex. C.)

The Plaintiffs spelled out the facts of the case, and then requested an opinion on whether a particular vote of the Cuyahoga Falls Council could be the subject of a referendum vote of the people. (Docket # 33, ex. C, pp I-VI.) The Plaintiffs also requested the following forms of injunctive relief: (1) an order restraining the Defendants from furthering the referendum process; (2) an order barring the Defendant Board of Elections from returning the petition to the City Defendants, (3) an order barring the City Defendants from submitting same to the Board of Elections, (4) an order barring the Board of Elections from certifying and verifying the petition, (5) an order enjoining the electors from attempting to overturn the ordinance by referendum petition; and (6) the recovery of court costs, attorney fees, and "such other relief that is lawful and equitable in the circumstance." (Docket # 33, ex. C, pp III, IV.) The Plaintiffs also requested a declaration that the "Plaintiffs are able to proceed and should not be hindered in obtaining necessary building permits in an effort to promptly commence the construction of the apartment complex." (Docket # 33, ex. C, ¶ V.)

Clearly, Plaintiffs' state law complaint requested both declaratory and injunctive relief. The question thus arises whether such injunctive relief can itself be considered declaratory relief. In Ohio, a declaratory judgment action is brought pursuant to O.R.C. § 2721.02 which provides, in part, that the declaration prayed for "may be either affirmative or negative in form and effect." But this begs the question of precisely how that declaration would actually affect the parties. Fortunately, some guidance is provided by caselaw and by Ohio Revised Code Section 2721.09, which instructs that "[w]henever necessary or proper, further relief based on a declaratory judgment or decree previously granted

may be given." *See also American Life & Accident Ins. Co. of Kentucky v. Jones,* 152 Ohio St. 287, 89 N.E.2d 301 (1949) (Syllabus 3) ("Where a court has entered a declaratory judgment ... it has authority ... to grant any further necessary or proper relief.")

In *Union Oil Company of Cal. v. City of Worthington,* 62 Ohio St.2d 263, 405 N.E.2d 277 (1980), the Ohio Supreme Court explored the breadth of the relief available to a land owner who had brought a successful declaratory judgment action to strike down an unconstitutional zoning law. The defendant City in that case acknowledged that the reviewing court had the ability to declare the zoning laws unconstitutional but argued that it could then "go no further," but must leave the property "unzoned" until the city adopted new zoning legislation. *Id.* at 265, 405 N.E.2d 277. The *Union Oil* Court rejected this narrow restriction of the court's powers as "impractical and inequitable." *Id.* (quoting with approval *Ed Zaagman, Inc. v. City of Kentwood,* 406 Mich. 137, 277 N.W.2d 475 (1979)). Nonetheless, the Court recognized the danger of allowing a court to rezone the property from one classification to another without evidence of the reasonableness of the new zoning category. *Id.* at 266, 405 N.E.2d 277. Therefore, the Court set out a procedure for Ohio courts to follow in such a circumstance:

> [I]n a declaratory judgment action, upon finding existing zoning unconstitutional as applied to specific real property, the trial court should give notice to the zoning authority that, within a reasonable time certain, it may, at its option, rezone the property. Further notice should be given that, if the property is not rezoned within such period of time, the court will authorize the property owner to proceed with the

> proposed use if, on the basis of the evidence before it, the court determines the proposed use to be reasonable. The court may enjoin the property owner from seeking a building permit, establishing a nonconforming use or otherwise changing the status quo during the interim. If necessary, the court may conduct further proceedings, including the hearing of additional evidence, to determine whether the new zoning restrictions may constitutionally proscribe the owner's proposed use.

Union Oil, 62 Ohio St.2d at 267, 405 N.E.2d 277.

This Court explains the holding in *Union Oil* not because this Court intends to apply those guidelines to the facts of this case, but rather to show that Ohio law presumes that some sort of injunctive relief may be required in order to give meaning to a declaratory judgment. In *Union Oil* that relief necessarily included enjoining enforcement of the unconstitutional zoning policy. That Court also opined that appropriate relief might include authorizing a landowner to use property in a manner deemed reasonable by the court, or enjoining the landowner himself from changing the status quo before the city has had a chance to adopt new zoning requirements. *Id.*

Based on its reading of *Union Oil,* the Geauga County Court of Appeals reached a conclusion which this Court shares: in Ohio, a court which enters a declaratory judgment may grant whatever relief is necessary or proper to give effect to that declaratory judgment. *Ketchel v. Bainbridge Twp.*, 79 Ohio App.3d at 178, 607 N.E.2d 22.[17] The *Ketchel* Court

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[17] Other Ohio cases reinforce the conclusion that necessary or proper, or in other words, *appropriate* relief is typically granted upon the issuance of a declaratory judgment in Ohio. *See W.O. Brisben Co. v. City of Montgomery,* 92 Ohio App.3d 812, 822, 637 N.E.2d 347, 354 (Hamilton Cy. 1994) (applying *Union Oil* guidelines); *Chace v. Dorcy Int'l. Inc.*, 68 Ohio App.3d 99, 587 N.E.2d 442 (Cuyahoga Cy.1991) (Krupansky, C.J.) (finding money damages can be appropriate in a declaratory judgment action for indemnification); *Gannon v. Perk,* 47 Ohio App.2d 125, 352 N.E.2d 606 (Cuyahoga Cy.1975) (Syllabus 1) (Krenzler, C.J.) (holding that when declaratory judgment action also seeks ancillary injunctive relief the nature of the action has not been changed from one at law to one at equity), *aff'd in part, rev'd in part on other grounds,* 46 Ohio St.2d 301, 348 N.E.2d 342 (1976).

then reasoned that because the request for necessary injunctive relief in that plaintiff's complaint would not change the nature of the declaratory action, the declaratory cause of action would fit cleanly into the declaratory judgment exception to the doctrine of res judicata. *Id.*[18] It is now for this Court to determine whether the relief these Plaintiffs requested in their state claim was necessary and proper, that is, whether it was relief appropriate to a claim for declaratory

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[18] Defendants urge the Court to view *Ketchel* and consequently *Union Oil* narrowly so as to limit the availability of "necessary and proper" relief only to declaratory actions which question the constitutionality of an ordinance. While those cases did indeed consider constitutional issues, the same conclusions can be drawn from the broader language in other authority which this Court must consider, including *American Life & Accident Ins. Co. v. Jones,* 152 Ohio St. 287, 89 N.E.2d 301 (1949) (Syllabus 3), and Ohio Revised Code Section 2721.09. Both sources allow "necessary or proper relief" in support of a declaratory judgment and neither base this relief on whether there is a constitutional basis for the declaration.

judgment. If so, then the state claim was clearly a declaratory judgment action.

Of the requests for relief stated by Plaintiffs and summarized by the Court *supra,* the first six request injunctive relief of the type necessary to give meaning to the Plaintiff's preferred court declaration: that the ordinance in question could not be the subject of a referendum of the people. Under Ohio law, the relief sought was typical of a declaratory judgment action and therefore, the nature of the declaratory action was not changed. This aspect of the initial state complaint supports the application of the declaratory judgment exception to the rule of res judicata.

The sixth form of relief also includes a request for attorney fees and costs. Such costs are expressly allowed by Ohio Revised Code Section 2721.11 which states, "In any proceeding under sections 2721.01 to 2721.15, inclusive, of the Revised Code, the court may make such award of costs as is equitable and just." It is thus clear that the request for fees and costs made by Plaintiffs in the initial action does not change the nature of that cause of action and does not affect the applicability of the declaratory judgment exception to the doctrine of res judicata.

Finally, the Court considers Plaintiffs' other request for a declaration that the "Plaintiffs are able to proceed and should not be hindered in obtaining necessary building permits in an effort to promptly commence the construction of [the apartment complex]." (Docket # 33, ex. C, ¶ V.) One might argue that this particular demand for relief involves something that is beyond the scope of the rest of the complaint, namely, a declaration that Plaintiffs should not be hindered in their attempts to obtain their building permits. The Court does not,

however, view this request as a fatal flaw. First of all, on its face, this demand for relief involves only a request for a declaration and not a request for injunctive relief. Second, even if the demand was read as one for injunctive relief, that injunctive relief would be appropriate under the circumstances. That is, if Plaintiffs had been successful in obtaining a declaratory judgment that the referendum was illegal, the state court would have been well within its authority to preclude the defendants from interfering with the rights held by Plaintiffs in the absence of that referendum. One of those rights would be the right of the landowner to apply for and (presuming the landowner met all other prerequisites) receive building permits. Hence, the relief sought by Plaintiffs in the initial state declaratory action was appropriate to such a cause of action and did not change the nature of that action.

By way of summary, this Court finds that the cause of action first brought in state court by these Plaintiffs was one for declaratory judgment on an issue of state law which is not a basis for their current claims before this Court. While the Ohio law of res judicata would prevent the Plaintiffs from re-litigating that state law question, an exception to that rule allows these Plaintiffs to bring this subsequent lawsuit because it relies upon different, federal legal theories. Therefore, the instant cause of action is not barred by res judicata.

IV. Standing of the Fair Housing Service.

Although not challenged by Defendants, the Magistrate Judge below appropriately considered the jurisdictional requirement of standing. This Court agrees with the Magistrate Judge that "federal courts are under an independent obligation to examine their own jurisdiction, and

standing 'is perhaps the most important of [the jurisdictional] doctrines.' " (Magistrate's Report, docket # 86, at 45 (citation omitted).) Standing is a rule of practice designed to enforce the constitutional rule that United States Courts only have jurisdiction over "cases" or "controversies." *Akron Bd. of Educ. v. State Bd. of Educ. of Ohio,* 490 F.2d 1285, 1289 (6th Cir.), *cert. denied,* 417 U.S. 932, 94 S.Ct. 2644, 41 L.Ed.2d 236 (1974) (quoting *Barrows v. Jackson,* 346 U.S. 249, 257, 73 S.Ct. 1031, 1035-36, 97 L.Ed. 1586 (1953); U.S. Const. art. III, § 2 cl. 1); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). "[T]he question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). "In order to establish standing sufficient to satisfy the 'case or controversy' requirement of Article III, a plaintiff in federal court must allege 'such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on its behalf.' " *Greater Cincinnati Coalition for the Homeless v. City of Cincinnati,* 56 F.3d 710, 715 (6th Cir.1995) (quoting *Warth v. Seldin,* 422 U.S. at 498-99, 95 S.Ct. at 2205 (quoting *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962))).

The Supreme Court's most recent pronouncement on standing explained that in order to establish standing under the Constitution, a plaintiff must show three things; as an "irreducible minimum" there must be:

(1) an injury in fact,

(2) a causal relationship between the injury and the

challenged conduct, and

(3) a likelihood that the injury will be redressed by a favorable decision.

United Food and Commercial Workers v. Brown Group, Inc., --- U.S. ----, ----, 116 S.Ct. 1529, 1533, 134 L.Ed.2d 758 (1996) (citing *Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 663, 113 S.Ct. 2297, 2301-02, 124 L.Ed.2d 586 (1993); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758-59, 70 L.Ed.2d 700 (1982)). In addition to the requirements imposed by the Constitution, the courts have developed certain nonconstitutional prudential considerations which further guide a court's determination regarding a party's standing.

"[T]he plaintiff generally must assert his own legal rights, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin,* 422 U.S. at 499 [95 S.Ct. at 2205]. In addition, even when the plaintiff has alleged redressible injury sufficient to meet the requirements of Art. III, the Court has refrained from adjudicating "abstract questions of wide public significance" which amount to "generalized grievances," pervasively shared and most appropriately addressed in the representative branches. *Id.* at 499-500 [95 S.Ct. at 2205-206]. Finally, the Court has required that the plaintiff's complaint fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data*

Processing Service Orgs. v. Camp, 397 U.S. 150, 153, 90 S.Ct. 827, 829-30, 25 L.Ed.2d 184 (1970).

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474-75, 102 S.Ct. 752, 759-60, 70 L.Ed.2d 700 (1982).

In his report and recommendation, the Magistrate Judge found that the Fair Housing Contact Service lacks standing as an association to bring the instant claims. As the Magistrate explained, an organization may have standing to sue in a representative capacity only when it can show that, "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested requires participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977); *see also International Union, United Auto., Aerospace and Agr. Implement Workers of America v. Brock,* 477 U.S. 274, 282, 106 S.Ct. 2523, 2528-29, 91 L.Ed.2d 228 (1986); *Greater Cincinnati Coalition for the Homeless v. City of Cincinnati,* 56 F.3d 710, 717 (6th Cir.1995) (quoting *Hunt*). The Magistrate believes that the Fair Housing Contact Service has not satisfied these requirements.

In reaching this conclusion the Magistrate considered all of the relevant evidence in the record. First, he noted that the only direct reference to the Plaintiff Service in the complaint was in paragraph eight which alleges:

> Plaintiff Fair Housing Contact Service is a not-for-profit, fair housing organization located in Akron, Ohio. Fair Housing Contact Service has had a

> contract with Summit County since 1974 to provide fair housing services, landlord-tenant counseling, housing research, and technical assistance. Fair Housing Contact Service is required to provide for fair housing activities throughout the county. Part of this agreement states that as a recipient of funding, Fair Housing Contact Service will "administer all programs and activities relating to housing and community development in a manner to affirmatively further fair housing within Constitutional limitations throughout the United States." Some of its employees and members are potential tenants for the apartment complex to be built by the Developers at the Pleasant Meadow Blvd[.] property. The actions and conduct of the defendants are frustrating the fair housing purpo[ ]se of the organization, its employees and members.

(Docket # 1 at ¶ 8.) Nowhere else in the complaint is the Fair Housing Contact Service specifically mentioned.

Other references to the Plaintiff Service also found includes an October 29, 1996 affidavit of Lynn M. Clark, Executive Director Fair Housing Contact Service. (Docket # 50, Exhibit L.) In pertinent part, the affidavit states:

> FHCS has been damaged by the Defendants in case No. 5:96CV1458 because its mission has been thwarted and its resources expended to combat the discrimination in housing that FHCS believes occurred as described in the pleadings in that matter.
>
> FHCS employees and individual members who subscribe to our services will be harmed by the Defendants in case No. 5:96CV1458 because they are perspective [sic] eligible residents for this housing

> which would enable them to save monies and not be forced to expend excess funds on obtaining safe and decent housing. Preventing the development of this housing will cause FHCS employees and members permanent and irreversible harm by denying them an [sic] choice of affordable, safe and decent housing located in the neighborhood of their preference.
>
> (Docket # 50, Exhibit L.)

Further evidence was obtained on Tuesday, November 19, 1996, at the injunction hearing before this Court. Plaintiffs presented the testimony of two persons who identified themselves as members of Fair Housing Contact Service, Sandra Montgomery and Crystal M. Williams. (Tr. at pp. 158-69.) Ms. Montgomery testified that she had been a member of Fair Housing Contact Service for about four years. (Tr. at p. 159.) In response to the question, "[i]f you could rent a two or three bedroom apartment in Cuyahoga Falls on Pleasant Meadow Boulevard and your child could attend the Woodridge schools at a below market rent, below fair market rent value, would you apply to rent at that apartment building?", Ms. Montgomery testified, "Yes, I would." (Tr. at p. 159.) On cross-examination, Ms. Montgomery testified that she became a member of Fair Housing Contact Service by calling its office, that she did not have to pay any dues, and that she does not receive any newsletters. (Tr. at pp. 159-60.) She described her contact with Fair Housing Contact Service since becoming a member as "not a lot." (Tr. at p. 160.) Ms. Montgomery further testified that her first contact with anyone regarding the case was the previous Saturday, when she spoke with Lynn Clark and volunteered to testify. (Tr. at pp. 162-63.)

Crystal Williams also testified that she would apply to rent a two or three bedroom apartment, at below market rent, on Pleasant Meadow Boulevard in Cuyahoga Falls. (Tr. at p. 166.) Ms. Williams, a student at the University of Akron, testified that if she had a subsidized apartment, she would probably attend graduate school. (Tr. at 166-67.)

Although the Fair Housing Contact Service appears to be a rather uncomplicated organization to join and maintain membership in, this Court knows of no stringent federal requirements that members of an organization must satisfy in order to be considered an organizational member. Nevertheless, the evidence does tend to show that the members are interested in equal access to subsidized housing--a topic central to the stated purpose of the Contact Service--thus it would appear that if there were some formalistic requirement for membership, both Ms. Montgomery and Ms. Williams would qualify. The Court views these women as proper "members" for purposes of determining the Fair Housing Contact Service's standing.

As this Court explained above, there are many important requirements for standing; while most of these do not require exhaustive discussion by this Court sua sponte, the Court does feel obliged to address those requirements discussed by the Magistrate in his report and recommendation. Specifically, the Magistrate Judge questions whether the Fair Housing Contact Service or its members have been injured by the Defendants' actions. (Docket # 86, at 50.) Without an injury in fact to itself or its members, the Contact Service does not have standing.

The Magistrate Judge correctly notes that the Contact Service itself has only alleged two specific harms: a

thwarting of the Contact Service's mission to provide fair housing access, and the expenditure of significant time and resources to combat what it perceives to be discriminatory housing actions in this case. While the Court has serious questions regarding whether these injuries are sufficiently concrete and particularized to convey standing on the organization itself, the Court need not address those questions as it finds that the Contact Service has presented facts sufficient to allow a finding of standing in its representative capacity.

First, no one has contested, and this Court sees no reason to conclude that either the claim asserted or the relief requested requires participation of the Contact Service's individual members in the lawsuit. *See Neighborhood Action Coalition v. City of Canton,* 882 F.2d 1012, 1017 (6th Cir.1989) (allowing association to pursue injunctive relief). Second, there can be little doubt that the interests that the Contact Service seeks to protect are germane to its purpose. Finally, there is substantial evidence that the Contact Service's members would have standing to sue in their own right. *See Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. at 343, 97 S.Ct. at 2441 (establishing associational standing).

It is fitting, of course, for this Court to hold Plaintiffs to a burden of proof appropriate to this particular stage of litigation. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 2136-37, 119 L.Ed.2d 351 (1992). Currently, the Court is considering a case that is at the summary judgment stage, and thus the Plaintiff Contact Service need only " 'set forth' by affidavit or other evidence 'specific facts' [which] will be taken as true." *Id.* Granted, this can be a substantial burden because the injuries of the

Plaintiff Contact Service's members arise from the government's allegedly unlawful treatment of someone else. *See id.* at 562, 112 S.Ct. at 2137. But the Plaintiff Contact Service is not precluded from establishing that the government defendant's actions cause redressible injury to befall the members of the Contact Service in addition to the sponsors of the project itself. *Id.*

In the instant case, the testimony of Ms. Montgomery and Ms. Williams, which this Court must accept as true, indicates that they are African-American mothers of young children whose income makes them eligible for subsidized housing. Both women testified that they would like to be residents in the apartment complex which the Defendants are alleged to have illegally prevented from being built. At this stage of the proceedings, the testimony of Ms. Montgomery and Ms. Williams is sufficient to establish that the Defendants' denial of the site plan and subsequent denial of building permits caused them a concrete and particularized injury. Furthermore, it cannot be questioned that should the Plaintiffs in the instant cause of action be successful, the members of the Contact Service will have their injuries redressed by the actual building of the apartment complex in which they wish to live. Fair Housing Contact Service members Montgomery and Williams could file suit in their own right if they so choose.

Because the members of the Plaintiff Fair Housing Contact Service could bring this action in their own right, and because the Plaintiff's ability to satisfy the other associational standing requirements is not in doubt, this Court concludes that the Plaintiff Fair Housing Contact Service has presented sufficient evidence at this stage to satisfy the Court's inquiry into its standing to bring the instant cause of action. Insofar

as the Magistrate Judge's recommendation is contrary to this holding, it is not adopted.

V. Judicial Immunity.

Next, the Defendants make the creative argument that they are entitled to judicial immunity for all of their actions occurring after Judge Murphy issued his opinion in the state court case. The argument is presented as follows: "An administrative officer who is carrying out a court order is cloaked with judicial immunity for claims of civil rights actions." (Docket # 32, at 13 (citing *Foster v. Walsh,* 864 F.2d 416 (6th Cir.1988)).) "[Judge Murphy] issued an order upholding the referendum provision of the City charter and denying the plaintiffs' request for injunctive relief." (*Id.*) Hence, "the City's actions have been taken in obedience to a court order, [and] the City and its officials are judicially immune from the allegations of the instant lawsuit." (*Id.*) Defendants oversimplify and misapply the doctrine of judicial immunity.

Although, generally speaking, a person may enjoy judicial immunity while carrying out a court order, the Defendants in the instant case were not carrying out such an order. Judge Murphy's decision in the original state cause of action specifically denied the Plaintiffs' request for a preliminary or permanent injunction. (Docket # 33, ex. B.) Judge Murphy did not affirmatively order the Defendants to do anything. It follows that the Defendants were not carrying out a court order when they transmitted the referendum to the Board of Elections for inclusion on the next ballot, when they refused to give effect to the site plan ordinance, or when they denied Plaintiffs their requested building permits. The only thing that can be said about the Defendants' conduct is that it did

not violate the court order. Their motion for summary judgment on this ground is frivolous. The motion is denied.

VI. Plaintiffs' Constitutional and FHA Claims.

A. Effectiveness of the Ordinance and Effect of the Petition.

In order to understand the Plaintiffs' federal claims and the Defendants' motions opposing them, it is first important to understand the procedural context in which they arose. A summary of the legislative process followed in this case is thus provided. The Cuyahoga Falls City Council approved the ordinance which embodied Plaintiffs' site plan on April 1, 1996. The Mayor did not sign the ordinance, but according to the City Charter Article 2, Section 5, if the mayor does not act upon the ordinance within ten days then the ordinance "shall take effect in the same manner as if he had signed it," what this Court will refer to as a "pocket approval." So ten days after its passage by Council, the ordinance was pocket approved by the Mayor. As of this stage there was no evidence that the City Defendants did anything to give effect to the citizen's petition. But the Court will inquire further to determine if the City Defendants' subsequent actions implicated the Plaintiffs' federal rights.

Section 4 of the ordinance in question denotes that it would go into effect immediately only if it was approved by "two thirds of the members elected or appointed to Council," (Plaintiffs' exhibit 8), however, the ordinance received only 6/11 of the vote. It was not an emergency measure and did not take effect immediately. Instead, the ordinance was to take effect "as provided by law," a phrase not explained in the Cuyahoga Falls Charter, nor in the Rules and Regulations, Ordinance Number 77-1991. So, pursuant to that ordinance,

we look to the Ohio Revised Code for guidance. (*See* Ord. Nos. 77-1991, §§ 8.2, 10.4.) Ohio Revised Code Section 705.16 provides: "All ordinances or resolutions shall be in effect after thirty days from the date of their passage...." Section 1.14 of the Ohio Revised Code tells us that when counting thirty days, the first day is excluded and the last day included. May 1, 1996, is thirty days from April 1, 1996; May 2, 1996, is the first day *after* thirty days from the date of passage. Therefore, the ordinance was to take effect the moment after 12:00 midnight on May 2, 1996. *See Frontier-Embers Supper Club, Inc. v. Board of Liquor Control,* 112 Ohio App. 325, 172 N.E.2d 717 (1960). The question remains whether these City Defendants did anything to prevent the Plaintiffs' site approval ordinance from taking effect.

The City Charter states that within 30 days after the Council passes an ordinance, citizens of the city may file a petition signed by at least ten percent of the electors requesting that such ordinance be repealed or submitted to the voters as a referendum. (Charter Art. IX, § 2.) Such a petition was filed in this case on or about April 29, 1996. If the ordinance so challenged is not repealed by the Council within thirty days, the ordinance is to be submitted to a vote of the people. The ordinance itself cannot "go into effect until approved by a majority" of the electorate. (Charter Art. IX, § 2.) An ordinary reading of this Charter provision could lead one to conclude that the effectiveness of the Ordinance is stayed when the Council recognizes the filing of a valid petition.[19] However, Plaintiffs argue that the Charter language only stays the effectiveness of ordinances which

[19] This is a common procedural construct in Ohio. *See* O.R.C. § 731.29; Ohio Constitution Art. II, § 1C, Art. XVIII, § 5.

have already been reconsidered by the Council and not repealed, and which have consequently been prepared for submittal to a referendum of the people. In other words, Plaintiffs believe that the effectiveness of the law is not stayed until the ordinance has been referred to the Board of Elections, which in this case occurred on May 30, 1996.

While the Court agrees that Article IX, § 2 is not artfully drafted, the Court must also agree with Defendants that its meaning is clear enough. In a vacuum, the words "no such ordinance" have little meaning, or rather, they have so many potential meanings that they are quite unhelpful. But here, the words "no such ordinance" are followed by the words "shall *go into effect* until approved by a majority of those voting thereon...."[20] It is axiomatic that in order for an ordinance to "go into effect" it cannot already be in effect. Thus in order to give meaning to these words in Article IX, Section two of the Cuyahoga Falls Charter, the Court must conclude that the ordinance has never gone into effect. At some moment in time after the filing of the petition and before the ordinance was to take effect on May 2, the effectiveness of the ordinance was stayed.

Indeed, upon the filing of the petition, the City Engineer Gerald Dzurilla sought advice from the City Law Director concerning the effect of the petition on his authority to issue building permits for the property identified in the ordinance. (Dzurilla aff. ¶ 4.) On April 30, 1996, Engineer Dzurilla received a response indicating that building permits for the construction of the apartment complex could not be issued

[20] The provision also explains that the law will not take effect until five days after certification of that approval by the Board of Elections.

because the site plan ordinance "does not take effect" due to the petitions. (Dzurilla aff. ¶ 5, ex. A.) Thus, practically as well as theoretically speaking, the Plaintiffs were unable to secure the benefit of their otherwise lawfully approved site plan on the date that the site plan was to take effect, May 2, 1996.

Defendants now move for judgment on the substance of the Plaintiffs' claims arising from this chain of events. Although there are several bases for Plaintiffs' instant claims, the gist of all of those claims is that Plaintiffs have been unlawfully denied their site plan and all of its consequent benefits, including a building permit for their low-income housing project. Because the Plaintiffs believe that the City's action was arbitrary and capricious when it withheld the site and building permits, Plaintiffs allege a claim based in substantive due process as protected by the Fourteenth Amendment and Section 1983. The Plaintiffs also believe that the city refused to give effect to the site plan ordinance and thus gave effect to intentional racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment and Sections 1981, 1982, and 1983. Putting aside for the moment the racial motivations, Plaintiffs further argue that the city gave effect to a referendum which had no rational relationship to the granting of a site plan. Finally, the Plaintiffs allege that by staying the effectiveness of the site plan, the Defendants furthered anti-family bias in violation of the Fair Housing Act.

B. Ripeness.

The question of ripeness has not, of course, been raised by the parties as a question unto itself but rather it has arisen as an element of this Court's previous discussions of the doctrine of res judicata. (*See* docket # 94, at 11.) Because the issue has been so thoroughly briefed and because a discussion of ripeness is so instructional on the merits of Plaintiffs' federal claims, the Court will address it first.

It has been said that the ripeness doctrine "dictates that courts should decide only existing, substantial controversies, not hypothetical questions or possibilities.... Ripeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all." *City Communications, Inc. v. City of Detroit,* 888 F.2d 1081, 1089 (6th Cir.1989). The determination of whether a claim is ripe rests both on Article III of the Constitution and on a court's discretionary powers. *See e.g., Buckley v. Valeo,* 424 U.S. 1, 114, 96 S.Ct. 612, 680, 46 L.Ed.2d 659 (1976) (per curiam); *Socialist Labor Party v. Gilligan,* 406 U.S. 583, 588, 92 S.Ct. 1716, 1719, 32 L.Ed.2d 317 (1972); *see also* 13A Wright, Miller, & Cooper, *Federal Practice and Procedure,* § 3532 (1984). At a minimum, ripeness requires that the effects of the administrative action challenged have been "felt in a concrete way by the challenging parties." *Reno v. Catholic Soc. Servs., Inc.,* 509 U.S. 43, 57, 113 S.Ct. 2485, 2495, 125 L.Ed.2d 38 (1993) (quoting *Abbott Labs. v. Gardner,* 387 U.S. 136, 148-49, 87 S.Ct. 1507, 1515-16, 18 L.Ed.2d 681 (1967)); *see also Lujan v. National Wildlife Federation,* 497 U.S. 871, 891, 110 S.Ct. 3177, 3190, 111 L.Ed.2d 695 (1990) (a controversy concerning a regulation is not ordinarily ripe for review until the regulation has been applied to the claimant's situation by some concrete

action).

Previously, this Court considered Plaintiffs' contention that their claim was not ripe until the election on November 6, 1996, when the voters of Cuyahoga Falls voted down the ordinance in question. The Plaintiffs believed that this Court's analysis was controlled by the Supreme Court's opinion in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). *See also Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n,* 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983). In *Williamson,* the Supreme Court considered a takings claim brought pursuant to 42 U.S.C. Section 1983, and held that the claim was not yet ripe because the initial decisionmaker in that case had not yet arrived at a definitive position on the plaintiff's zoning request and thus the plaintiff had not suffered an actual, concrete injury. *Id.* The Plaintiffs in this case argued that they were unable to bring their federal causes of action until the *voters* of Cuyahoga Falls denied them of the rights they now seek to enforce. According to Plaintiffs, only after the election on November 6, 1996, was there a definitive position taken and they suffered an actual, concrete injury. The Court, however, did not accept this interpretation. (*See* docket # 94, at 15-16.)

After careful consideration, the Court is not convinced that the ripeness analysis heretofore applied by the parties and referred to by this Court is altogether applicable. That is, the Court believes that the application of the strict ripeness analysis explained in *Williamson* should be reserved to cases challenging the application of zoning laws. While the instant case does involve the regulation of real property by the local municipality, it does not involve a challenge to zoning laws

which unarguably would accommodate the Plaintiffs' proposed housing complex. Rather, the instant case involves a challenge to the City's refusal to grant the Plaintiffs the benefit of a site plan ordinance due to the filing of a petition. Such a challenge is properly addressed by an ordinary ripeness inquiry into whether the staying of the effectiveness of the site plan ordinance was felt in a concrete way by the Plaintiffs. All evidence in the record indicates that these Plaintiffs were prepared to build the controversial housing project upon receipt of the necessary permits, and that they were denied their ability to proceed under the site plan on May 2, 1996. Based on these facts, the Court cannot help but conclude that all of the Plaintiffs' claims were ripe on May 2, 1996.[21]

In any case, even if the Court were to apply the more formalistic analysis found in *Williamson* and its progeny, the Court would conclude that Plaintiffs' claims are ripe. Specifically, the Sixth Circuit has acknowledged in post-*Williamson* zoning challenges that claims based on the Due Process and Equal Protection Clauses rather than the takings provision, are subject to a less rigorous ripeness test. *See*

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[21] If this dispute centered only on the consequent denial of building permits to Plaintiffs, the conclusion would be the same. While Defendants argue that the building permits were properly denied because the Plaintiffs had failed to erect a costly fence on one end of the property, the facts make it clear that the building of the fence by Plaintiffs would have been a futile act--what the Sixth Circuit has referred to as "a waste of time and money." *Bannum, Inc. v. City of Louisville, Ky.,* 958 F.2d 1354, 1362 (6th Cir.1992). The Defendants had already concluded that the building permits could not issue due to the ineffective site plan ordinance. (*See* Dzurilla aff. ¶ 5, ex. A.)

Nasierowski Bros. Inv. Co. v. City of Sterling Heights, 949 F.2d 890, 895 (6th Cir.1991); *Bannum, Inc. v. City of Louisville, Ky.*, 958 F.2d 1354, 1362-63 (6th Cir.1992); *see also Marbrunak, Inc. v. City of Stow*, 974 F.2d 43, 46 (6th Cir.1992) (implying same ripeness inquiry applicable to Fair Housing Claims). In *Nasierowski*, the Sixth Circuit considered a due process claim challenging the process by which an amendment was made to a zoning statute. The Circuit held that because the City Council in that case had voted to pass a new zoning ordinance which, *in and of itself* inflicted immediate injury on the plaintiff, his procedural due process claims was ripe without requiring him to first seek relief from the city's board of zoning appeals. *Nasierowski*, 949 F.2d at 893-95. There was, therefore, no need to engage in the sort of strict ripeness analysis which the Supreme Court had considered in *Williamson*. Later, in *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1214-15 (6th Cir.1992), the Sixth Circuit extended this understanding of the law to cases involving plaintiffs' demands for substantive due process. *See also Millington Homes Investors, Ltd. v. City of Millington, Tenn.*, 60 F.3d 828 (Table), 1995 WL 394143, at *8 (6th Cir.1995) (holding no ripeness requirements for substantive due process claims in zoning cases). Applying the *Pearson* holding to the instant matter, the Court must find that the Plaintiffs' due process claim satisfies any ripeness requirements.

In two cases involving equal protection challenges to the application of local zoning laws, *Bannum, Inc. v. City of Louisville, Ky.*, 958 F.2d 1354, 1362-63 (6th Cir.1992), and *Seguin v. City of Sterling Heights*, 968 F.2d 584, 587-88 (6th Cir.1992), the Sixth Circuit acknowledged the doctrine of futility as a method for attaining ripeness despite a plaintiff's

failure to fulfill the *Williamson* final decision requirement. The *Bannum* Court first articulated the *Williamson* concern that finality is required before a plaintiff may bring a constitutional challenge. But the *Bannum* Court explained the reasoning behind the requirement as follows: "We do not want to encourage litigation that is likely to be solved by further administrative action and we do not want to put barriers to litigation in front of litigants when it is obvious that the process down the administrative road would be a waste of time and money." *Bannum*, 958 F.2d at 1362. Then, focusing on the latter half of this explanation, the *Bannum* Court acknowledged that the *Williamson* finality requirement could be satisfied if further administrative action by the Plaintiff would be futile. *Bannum*, 958 F.2d at 1362-63. In order to successfully argue for the application of the futility exception, a plaintiff must have made at least one unsuccessful "meaningful application" for a zoning variance. *Id.* at 1363; *Seguin*, 968 F.2d at 589.

The claim brought by the Plaintiffs in the instant case is factually distinct from the context in *Bannum* and *Seguin*, but their reasoning is nonetheless helpful. Here, the Plaintiffs do not complain of an unfair zoning requirement and the failure of the city to grant a variance to that requirement as did the plaintiffs in *Bannum* and *Seguin*. The land bought by these Plaintiffs was already properly zoned for the type of multi-family apartment complex which the Plaintiffs propose. The Plaintiffs bought properly zoned property, met the conditions required by the City for a site plan, had that site plan approved by committee, by the Council as a whole, and by the Mayor, and only then were they denied the benefit of that site plan ordinance when the City, pursuant to its Municipal Charter, gave effect to a petition bearing the signatures of ten

percent of the citizenry. Thus, the Court finds it appropriate to restate its conclusion that this is not the typical *Seguin* or *Williamson*-styled *zoning* case, rather this case involves the constitutionality of giving effect to the citizens' petition by withholding the effectiveness of the Plaintiffs' site plan ordinance. It follows that *Williamson*'s strict ripeness requirements should not apply at all, but in any case, it is clear that these Plaintiffs need not have applied for a zoning variance in order to bring a ripe equal protection claim.

One could argue, however, that the requirement of a meaningful application for a zoning variance is analogous in this case to a requirement that the Plaintiffs must attain finality through the vote of the electorate at the referendum. Applying the futility analysis of the Circuit's equal protection zoning cases, the Court finds that the Plaintiffs' equal protection claims are ripe because any further "process down the administrative road" would have been "a waste of time and money." *Bannum,* 958 F.2d at 1362. Granted, as of May 2, 1996, the citizens of Cuyahoga Falls had not yet overwhelmingly defeated the Plaintiffs' site plan ordinance as they did in November of that year, but the proof of time supports what was then an inevitable conclusion: The Plaintiffs' site plan ordinance would never gain the support of the citizenry. Insofar as the Plaintiffs can be seen to have failed to complete their administrative process, the undisputed evidence supports the conclusion that pursuit of that administrative process through the polls would have been futile.

Finally, the Defendants have argued that the Plaintiffs' claims were not ripe because they failed to build a fence as they were required to do by the terms of the site plan. This argument fails at this stage of the proceedings for at least two

reasons. First, the Plaintiffs here challenge the denial of the site plan itself as well as the building permit which had the fence as a prerequisite. The Defendants' "fence" argument does not explain the denial of the site plan itself.[22] Second, there is ample evidence in the record which would indicate that building the fence would have been "a waste of time and money." *Bannum,* 958 F.2d at 1362. *See* testimony of Boone at Tr. 48, 92. Plaintiffs have presented evidence that it would have been futile to build the required fence.

In sum, no matter which approach to the doctrine of ripeness one takes, the result is the same, the Plaintiffs' claims were ripe by May 2, 1996.[23]

C. Failure to State a Claim/Municipal Liability.

Defendants have raised a number of other defenses to Plaintiffs' claims, including the assertion that the Plaintiffs' constitutional claims fail to state a claim against the City of Cuyahoga Falls upon which relief can be granted. (Docket # 32, at 13-14.) Because Plaintiffs have brought suit against most of the Defendants in solely their official capacity, the City is a true Defendant in this matter, and the Defendants' argument is logically raised. Indeed, it is well-established law that a municipal corporation is not liable for every civil rights violation committed by one of its employees. *Monell v. Dep't of Social Services of City of New York,* 436 U.S. 658, 98

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[22] The Defendants had already concluded that the building permits could not issue due to the ineffective site plan ordinance. (*See* Dzurilla aff. ¶ 5, ex. A.)

[23] Even if *Pearson* had not presented this Court with direct precedent for finding Plaintiffs' substantive due process claim to be ripe, the Court would find it ripe under this futility analysis as well.

S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Frost v. Hawkins County Bd. of Educ.*, 851 F.2d 822, 828 (6th Cir.1988). Rather, in order for the Municipality to be held liable, the Plaintiffs must demonstrate that the unconstitutional act complained of was committed by one of Defendant's employees *pursuant to an established policy or custom of that government defendant*. *Id.* Under appropriate circumstances, a specific occurrence of the deprivation of a constitutional right by the City could establish such an illegal policy or custom if the deprivation was due to the decision of a municipal policymaker. *Pembaur v. City of Cincinnati,* 475 U.S. 469, 480, 106 S.Ct. 1292, 1298-99, 89 L.Ed.2d 452 (1986) (plurality).[24] Furthermore, a plaintiff must demonstrate that through its deliberate conduct, the municipality was the "moving force" behind the injury alleged. *Board of County Comm'rs of Bryan County, Okla. v. Brown,* --- U.S. ----, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997) (considering § 1983 excessive force claim).

In this case there can be no doubt that the policymakers of

[24] The identification of policymakers is a function of state law. *St. Louis v. Praprotnik,* 485 U.S. 112, 124, 108 S.Ct. 915, 924-25, 99 L.Ed.2d 107 (1988)(plurality); *Johnson v. Hardin County, Ky.*, 908 F.2d 1280, 1286-87 (6th Cir.1990) (harmonizing the *Praprotnik* opinions of Justices O'Connor and Brennan finding that a policymaker is he who, under state law, has decisionmaking authority unconstrained by the policy of a superior or of the city); *Adkins v. Board of Educ. of Magoffin County, Ky.*, 982 F.2d 952, 957-58 (6th Cir.1993). "A federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it." *Praprotnik,* 485 U.S. at 126, 108 S.Ct. at 925.

Cuyahoga Falls declared the site plan ordinance to be ineffective and refused to issue building permits for that reason. Moreover, it is clear that the policymakers of Cuyahoga Falls did so pursuant to provisions of their City Charter and that this city policy was the moving force which gave a staying effect to the citizens' petition and referendum. The question for the Court is thus, not whether the actions of the government actors were done pursuant to a city policy, they assuredly were, but rather the question is whether that policy has been applied so as to authorize the deprivation of federal rights.

D. Constitutionality of Federal Statutes and Viability of Plaintiffs' Claims.

Having now dealt with an abundance of jurisdictional and other preliminary matters, the Court finds that it can finally reach Defendants' arguments which, in turn, reach the substance of Plaintiffs' claims. As stated previously, Plaintiffs claim that they suffered harm to rights protected by the Fair Housing Act, 42 U.S.C. §§ 3601, 3604, and 3617, and provisions of the Civil Rights Act, including 42 U.S.C. §§ 1981, 1982, (Complaint ¶ 37), as well as the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983 (pp 39, 44); and the Equal Protection Clause of Fourteenth Amendment and 42 U.S.C. § 1983 (¶ 41). The Court will first address the Defendants' conceptually curious argument that the provisions of statutory law upon which Plaintiffs rely are unconstitutional as Plaintiffs seek to apply them. (Docket # 32, at 16.)

Defendants' first argument under this heading appears to challenge the Plaintiffs' Constitution-based claims which allege that Defendants violated the Plaintiffs' right to due

process and equal protection by giving effect to the citizens petition in refusing to grant site and building permits to the Plaintiff Developer. Defendants first argue that Plaintiffs' real dispute is with the citizens who brought the referendum to whom the Council deferred as required by the city charter. While Plaintiffs may indeed have a disagreement with the supporters of the referendum, Defendants' argument misses the point. The citizen's opposition would mean nothing if the City did not give it effect by denying permits to the Plaintiff Developer. It is that *City* action which the Plaintiffs challenge here. In truth, Defendants' argument is nothing more than a recycling of its argument against *Monell* municipal liability. Reframing the argument in this context does not change the Court's analysis of that issue.

1. Equal Protection.

Next, the Defendants argue that it would be unconstitutional to use federal statutes to condemn wholly constitutional activity. (Docket # 32, at 17.) Transposing those two negative concepts into one positive statement, the Court understands the Defendants to say that the citizens' petition for redress of grievances and the City's consequent actions are, as a matter of law, constitutionally permissible.[25]

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[25] Defendants' peculiar challenge to the constitutionality of the Civil Rights and Fair Housing Acts caused Plaintiffs to launch into explanations of first, the methods of proof in a discrimination claims and second, the supremacy of federal laws. (Docket # 50, at 23-25.) While in that section of their brief, the Plaintiffs say little that this Court disagrees with, the Court believes that the Defendants' challenge is more properly interpreted as an assertion that the referendum process is constitutional as a matter of law. It is that interpretation which the Court will analyze.

In support of this notion, the Defendants cite a state court appellate opinion and a decision of the United States Supreme Court, *James v. Valtierra,* 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed.2d 678 (1971).[26]

In *Valtierra,* the Court considered an equal protection challenge to a provision of the California Constitution which required a referendum on any low income housing project. According to the Court, the record in *Valtierra* would not support a claim that the constitutional provision was aimed at

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[26] The Court thinks it necessary to address one precedent not raised by Defendants. In an earlier opinion, *Ranjel v. City of Lansing,* 417 F.2d 321 (1969), the Sixth Circuit made the overly-broad statement that a referendum "may not be attacked on Equal Protection grounds since it is founded on neutral principles." 417 F.2d at 324. Relying on an opinion of the Supreme Court of California, *Mulkey v. Reitman,* 64 Cal.2d 529, 535, 50 Cal.Rptr. 881, 413 P.2d 825 (1966), the Sixth Circuit held that "the better practice was that ... which allowed the election to proceed and ruled on the validity of the measure after its passage." *Ranjel,* 417 F.2d at 325. The *Ranjel* Court reversed a District Court judgment enjoining a citizens' initiative.

> If this Court viewed the instant case as one seeking to prevent an election, the holding here would be much the same. In that case, the Court would follow *Ranjel* and allow the citizens' referendum to take place despite the implications for Plaintiffs' equal protection rights. But in this case, the citizens' democratic rights have already been exercised; the election has been held. (*See supra,* at 12.) Here, no one has prevented the citizens' from voting, rather the Plaintiffs challenge the constitutionality of the actions of the Defendants who gave effect to the allegedly improperly motivated petition. That challenge is properly before the Court.

a racial minority. *Id.* at 141, 91 S.Ct. at 1333-34. Nonetheless, the plaintiffs in that case argued that the mandatory referendum procedure was unconstitutionally discriminatory on its face because it disadvantaged persons desiring public housing more than it did other groups. *Id.* at 142, 91 S.Ct. at 1334. Noting that the procedure ensured a voice to all members of the community on a decision that could "lead to large expenditures of local governmental funds for increased public services and to lower tax revenues," *id.* at 143, 91 S.Ct. at 1334, the Court rejected the plaintiffs' argument. The Court concluded that the democratic decisionmaking which a referendum embodies would not "deny any person 'the equal protection of the laws.' " *Id.*

In the instant case, one of the constitutional grounds asserted by the Plaintiffs is that by giving effect to the petition of its citizens the City denied equal protection of the laws to lower-income families with children. (Complaint Count 3, pp 40, 41.) This is essentially the same claim that was rejected by the Supreme Court in *Valtierra*. Because the Supreme Court has definitively stated that a referendum on the building of a low-income housing project is rationally related to legitimate state interests, and because families are not entitled to a more deferential equal protection standard, the Court must grant the Defendants' motion for summary judgment on Plaintiffs' count three.

Nonetheless, while this Court shares the Supreme Court's belief that referenda can be seen as the embodiment of the democratic ideals upon which this country was based, this Court also appreciates that the framers of the Fourteenth Amendment took pains to prevent the rights of a racial minority from being thwarted by the less then compelling whims of the majority. Indeed, in another context the

Supreme Court has said that a "citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas v. Forty-Fourth General Assembly of Colo.*, 377 U.S. 713, 735-36, 84 S.Ct. 1459, 1473-74, 12 L.Ed.2d 632 (1964) (finding referendum on state apportionment of legislature has no constitutional significance if it does not satisfy equal protection requirements); *see also City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 676, 96 S.Ct. 2358, 2363, 49 L.Ed.2d 132 (1976) ("If the substantive result of the referendum is arbitrary and capricious, bearing no relation to the police power, then the fact that the voters of Eastlake wish it so would not save the restriction."); *Hunter v. Erickson,* 393 U.S. 385, 392, 89 S.Ct. 557, 561, 21 L.Ed.2d 616 (1969) ("The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed.").

If the Plaintiffs can demonstrate discriminatory intent or purpose, they will demonstrate a violation of the Equal Protection Clause, no matter the traditional reference to referenda. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-68, 97 S.Ct. 555, 562-65, 50 L.Ed.2d 450 (1977). Here, the Plaintiffs have attempted to provide evidence that the City furthered racial discrimination when it gave effect to the citizens' petition and consequently denied African-Americans the opportunity to live in the proposed low-income housing project. The substance of Plaintiffs' race-based challenge will be discussed later in this opinion, but it suffices to say that Plaintiffs may state a claim alleging that they were denied the equal protection of the laws by the actions of the Defendants. Cloaking the denial of Plaintiffs' requested permits in the vestments of democracy does not immunize it from

constitutional challenge.

2. Due Process.

Defendants also refute Plaintiffs' due process-based allegation that the City somehow delegated zoning power to its citizens. The Supreme Court considered a similar claim in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976). There, a developer challenged a city charter amendment which required that any rezoning action be ratified by 55% of the voters in a referendum. In rejecting the developer's due process challenge, the Supreme Court found that citizen referenda are reservations of power important to the democratic foundation of our system of government. *Id.* at 672-73, 96 S.Ct. at 2361-62.[27] The Court went on to explain

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[27] The *Eastlake* Court explained that

> "[a] referendum cannot ... be characterized as a *delegation* of power. Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create.... In establishing legislative bodies, the people can *reserve* to themselves power to deal directly with matters which might otherwise be assigned to the legislature. *Hunter v. Erickson*, 393 U.S. 385, 392, 89 S.Ct. 557, 561, 21 L.Ed.2d 616 (1969)."
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> "The reservation of such power is the basis of the town meeting, a tradition which continues to this day in some states as both a practical and symbolic part of our democratic processes. The referendum, similarly, is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies. The practice is designed to 'give citizens a voice on questions of public policy.' *James v. Valtierra*, 402 U.S. at 141 [91 S.Ct. at 1333-34]." *Eastlake*, 426 U.S. at 672-73,

that "[a]s a basic instrument of democratic government, the referendum process does not, in itself, violate the Due Process Clause of the Fourteenth amendment when applied to a rezoning ordinance." *Id.* at 679, 96 S.Ct. at 2364-65. The Supreme Court concluded that because the rezoning decision was properly reserved to the people, it was constitutional to permit the voters to decide whether to effectuate the plaintiff's proposed rezoning plan. *Id.*

Just as interesting as the *Eastlake* Court's holding, perhaps, is the topic which the Court expressly did not address. The Court found it significant that *Eastlake* was not a case of a zoning action "denigrating the use or depreciating the value of land; instead, it involves an effort to change a reasonable zoning restriction. No existing rights are being impaired; new use rights are being sought from the City Council." *Id.* at 679 n. 13, 96 S.Ct. at 2365 n. 13. Moreover, the majority noted that the plaintiffs could seek variances if they encountered unnecessary hardship. *Id.* The instant case is thus easily distinguished from that considered by *Eastlake*. Here the Plaintiffs are not seeking to change a reasonable zoning restriction, instead they are challenging a referendum concerning whether they themselves are allowed to enjoy the rights created by an already-existing zoning scheme. These Plaintiffs cannot seek a variance from unnecessary hardships; instead the citizens of Cuyahoga Falls sought and obtained a variance from the uniform application of the zoning laws. Thus, whatever insights can be drawn from *Eastlake*, it is clear that it is not, nor does it profess to be, on all fours with the claims advanced by these Plaintiffs. The *Eastlake* opinion simply does not contemplate the facts of

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96 S.Ct. at 2361-62 (footnotes omitted; italics added).

this case.

Comparatively, the facts of this case are similar to the facts which the Fifth Circuit confronted in *Wheeler v. City of Pleasant Grove,* 664 F.2d 99 (1981), *cert. denied,* 456 U.S. 973, 102 S.Ct. 2236, 72 L.Ed.2d 847 (1982). The Plaintiffs in *Wheeler* were apartment developers who were issued a building permit to construct an apartment complex. *Id.* In reliance upon that permit, the plaintiffs initiated preparatory work on the project. *Id.* at 100. As news of the impending construction spread throughout Pleasant Grove, citizen opposition mounted and was ultimately reflected in a referendum which demonstrated "an overwhelming resistance to the proposed apartment complex." *Id.* Consequently, the city adopted a new ordinance which forbade the building of any apartment complexes in town, and which, therefore, prohibited the plaintiffs from building their apartment complex. *Id.* The Fifth Circuit upheld the district Court's holding that the implementation of the new ordinance was arbitrary and capricious and that it was specifically intended to prevent the plaintiffs from exercising their building permit. *Id.*

In the instant case, there is substantial evidence on the record that the Plaintiff developers met all legal requirements for their site plan. Indeed, the Planning Commission approved the request, (Complaint at ¶ 17; Tr. at p. 35), and although it was obviously politically unpopular, the City Council affirmed the site plan ordinance. (Complaint at ¶ 19; Tr. at p. 43). The evidence also demonstrates that the Mayor himself, although opposed to the ordinance, (*see e.g.* Tr. at p. 43; Plaintiffs' ex. G), eventually "pocket approved" it. The public opposition to the proposed apartment complex was indisputably substantial and it manifested itself in a citizens'

petition which first, caused the City to deny Plaintiffs the necessary site plan approval, and second, caused a referendum which ultimately overrode the vote of Council and denied these Plaintiffs the effectiveness of the site plan. The Plaintiffs now request this Court to apply the analysis used by the Fifth Circuit in *Wheeler* to conclude that the reasons for the denial of the ordinance of "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare" of the community. *Wheeler,* 664 F.2d at 100 (quoting *Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926)).[28]

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[28] Two years after its decision in *Euclid,* the Supreme Court applied this holding to the application of a city ordinance which provided that in order to operate a "philanthropic home for children or for old people," the trustee must first obtain written consent from "the owners of two-thirds of the property within four hundred feet of the proposed building." *State of Washington ex rel. Seattle Title Trust Co. v. Roberge,* 278 U.S. 116, 118, 49 S.Ct. 50, 51, 73 L.Ed. 210 (1928). The Supreme Court acknowledged that *Euclid* required that "in its general scope" the ordinance must be held valid, but nonetheless found that the *Roberge* delegation of zoning power to a narrow segment of society was repugnant to the Due Process Clause. *Id.* at 122-23, 49 S.Ct. at 52. The Court found it particularly troubling that the decision of the neighboring landowners was "uncontrolled by any standard or rule prescribed by legislative action," and that the trustee was "bound by the decision or inaction of such owners.... [T]heir failure to give consent is final." *Id.* at 122, 49 S.Ct. at 52. *See also Eubank v. City of Richmond,* 226 U.S. 137, 143-44, 33 S.Ct. 76, 77, 57 L.Ed. 156 (1912) (holding that delegation of the power to determine use of property to two-thirds of neighbors is arbitrary and capricious, and unreasonable exercise of police power).

Although not controlling, an opinion by Chief Judge Peter Dorsey of the District of Connecticut is helpful in understanding the propriety of Plaintiffs' request. In *TLC Development, Inc. v. Town of Branford,* 855 F.Supp. 555 (D.Conn.1994), Chief Judge Dorsey was confronted with a situation in which a builder had requested a site plan which could only be denied "if it fail[ed] to comply with requirements already set forth in the zoning ... regulations." *Id.* at 557 (quoting Conn.Gen.Stat. § 8-3(g)). The defendant town nonetheless denied approval of the plaintiff's site plan because of reasons other than those specifically articulated by law. Judge Dorsey held that "there was no basis *in the law* for the denial." *Id.* at 558 (italics added). He explained that "[A] town, through its Commission, cannot arbitrarily refuse to permit a landowner to use land if the proposed use comports with the uses permitted in the district in which the land is located. By articulating the uses permitted in a district, a town has fixed the uses which accommodate all the considerations permitted by the law in adopting a town plan. Once it has done so, a town cannot prevent a permitted use based on factors which might have been, or were, considered in deciding the uses permitted in the zoning district." *Id.* In essence, Judge Dorsey found that it was rational for the Town to consider factors such as traffic, parking, and safety when making zoning decisions. But once that zoning decision has been made, it would be arbitrary and irrational to deny a site plan which actually conforms to that zoning decision, especially if the reasons for denial are the previously-addressed and decided traffic, parking, and safety concerns.

Similarly, the Defendants in the instant case enumerate a number of "rational" reasons for regulating the Plaintiff developer's land. But, as Judge Dorsey said in *TLC,* "That

is not the question presented." *Id.* at 558. Rather, the focus of this Court's inquiry is whether there is a rational basis *in the law* for the denial. Seen in a light favorable to Plaintiffs, the evidence in this case indicates that there was no such rational basis in the law. (Testimony of Planning Director Louis F. Sharpe, Tr. at 150, 156-57.) It follows that the Plaintiff developers have stated a claim that the denial of the site plan and building permits was arbitrary and capricious in violation of the Due Process Clause of the Fourteenth Amendment.

This conclusion is in conformity with Sixth Circuit due process precedent. In 1992, the Sixth Circuit explained what it terms to be the "many meanings of substantive due process." *Pearson v. City of Grand Blanc,* 961 F.2d 1211, 1216-17 (6th Cir.1992). First, the Circuit offered this general definition: Substantive due process is "[t]he doctrine that governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed...." *Id.* at 1216 (citations omitted). The Sixth Circuit then explained that chief among the rights protected by substantive due process is "[t]he right not to be subject to 'arbitrary or capricious' action by a state either by legislative or administrative action ..." *Id.* at 1216-17. The *Pearson* Court explains that when reviewing state administrative actions, federal courts can make an extremely limited review of the evidence to determine if the decisionmaker took a substantial departure from accepted norms; when reviewing legislative acts, the inquiry is further limited to whether the legislative action is rationally related to any legitimate state land use concern. The parties in the instant case have correctly treated the decisions to stay the effect of the site plan ordinance and to deny the Plaintiffs'

building permits as administrative actions, thus the Court should apply the deferential administrative standard to the case at hand. In effect, the Court should determine whether there was a basis *in the law* for the Defendants' actions.

As stated above, the Court finds that there is evidence in the record to support Plaintiffs' claim that there was no basis in the law for Defendants' actions. Plaintiffs have presented evidence that indicates that their proposed site plan comports with the present zoning classification. It is thus Plaintiffs' contention that there is no rational basis *in the law* for the denial, (*see Wheeler,* 664 F.2d at 100; *TLC,* 855 F.Supp. at 558), and that by giving effect to the citizens' petition, that is, by denying Plaintiffs the benefit of the site plan ordinance, the Defendant City has engaged in the arbitrary, irrational and therefore unconstitutional application of the law.[29] Without

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[29] An earlier Sixth Circuit opinion considering *a procedural* due process claim, *Brookpark Entertainment, Inc. v. Taft,* 951 F.2d 710 (1991), *cert. denied,* 506 U.S. 820, 113 S.Ct. 68, 121 L.Ed.2d 35 (1992), is analogous to the case at hand. In *Brookpark,* the Sixth Circuit struck down Ohio's former "Particular Premises Local Option" statute which allowed voters to target and ultimately divest particular establishments of their liquor licenses. After noting that the *Brookpark* plaintiffs had a property interest in their liquor licenses, *Brookpark,* 951 F.2d at 716, the Court held that the social regulation was demonstrably arbitrary or irrational, and therefore denied the Plaintiffs of property without due process of law. *Brookpark,* 951 F.2d at 716; *see also Duke Power Co. v. Carolina Envtl. Study Group, Inc.,* 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978). The *Brookpark* Court reiterated the concern expressed by the Seventh Circuit's Judge Posner, "that the voters might 'gang up' to drive

deciding the issue, the Court simply states that Plaintiffs have presented sufficient evidence to support such a due process claim brought pursuant to Section 1983. Accordingly, the Defendants' motion for summary judgment on this count is denied.

E. Intent to discriminate.

The only other substantive argument offered by Defendants against the Plaintiffs' Equal Protection and Fair Housing claims is that the Plaintiffs have failed to present evidence which could demonstrate that the site plan and building permits were denied for discriminatory reasons. (Docket # 32, at 14.) The Defendants offer several reasons why "reasonable minds could only conclude that the City acted with non-discriminatory reasons." (Docket # 32, at 14.) First, the Defendants note that the Planning Commission, the City Council, and the Mayor all effectively approved the project, and that the Clerk of Council merely followed the plain language of the City Charter when he referred the

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out of business a seller of liquor whom they disliked for reasons unrelated to any plausible public interest." *Brookpark,* 951 F.2d at 716 (quoting *Philly's v. Byrne,* 732 F.2d 87, 90 (1984)). According to Judge Posner, "This is a distinct type of arbitrary action that the requirement of fair procedure is designed to prevent...." *Philly's,* 732 F.2d at 90; *Brookpark,* 951 F.2d at 716. Based on this understanding of the law of procedural due process, the Sixth Circuit held that a statute which allows for the "arbitrary targeting" of a "particular premises" facially violates the Due Process Clause of the Fourteenth Amendment. *Brookpark,* 951 F.2d at 715. Here, the Plaintiffs' argument is that the citizens of Cuyahoga Falls "ganged up" to prevent them from building their low-income housing project for reasons unrelated to the consideration of a site plan ordinance.

petition to the Board of Elections for a referendum. Further, Defendants argue that City Engineer Dzurilla was only following the City Law Director's interpretation of the law when he refused to issue the Plaintiffs' building permits. Finally, the Defendants argue, the building permits could not be issued until the Plaintiffs constructed a substantial fence and associated mounding. Because the fence was never built, the building permit could not legally issue.[30] Based upon this understanding of the context, the Defendants believe that Plaintiffs cannot possibly prove the discriminatory intent essential to the FHA and Equal Protection claims.

Plaintiffs disagree. First, Plaintiffs note the oft-repeated adage that local government officials seldom state outright their discriminatory motives. (Docket # 50, at 19 (citing *Smith v. Town of Clarkton,* 682 F.2d 1055, 1064-65 (4th Cir.1982)).) Nonetheless, Plaintiffs acknowledge that they must present some proof of racially discriminatory intent or purpose to establish an equal protection claim. *See Washington v. Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977). In the typical equal protection challenge to governmental action, a plaintiff will attempt to establish the city's intent to discriminate by offering proof of four objective factors that have been found to be probative of racially discriminatory intent:

(1) the racial impact of an official action;

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[30] See the Court's rejection of this argument in the ripeness section *supra*. The Court's analysis applies equally well in this context.

(2) the historical background of the decision;

(3) the sequence of events leading up to the challenged decision, including departures from normal procedures and usual substantive norms; and

(4) the legislative or administrative history of the decision.

United States v. City of Birmingham, Mich., 727 F.2d 560, 565 (6th Cir.), *cert. denied,* 469 U.S. 821, 105 S.Ct. 95, 83 L.Ed.2d 41 (1984) (citing *Arlington Heights,* 429 U.S. at 266-67, 97 S.Ct. at 563-65) ("No single factor may be dispositive of this decision.").

In the instant case, the Plaintiffs have alleged that the government is giving effect to a petition (and thus also to the motivations) of its citizens. This Court is therefore confronted with "governmental action" that incorporates the actions and motivations of private citizens. Therein lies the dilemma, because although *Arlington Heights* teaches us to look at the context of the dispute, Sixth Circuit precedent advises against inquiring into the motivations of the electorate. *Arthur v. City of Toledo, Ohio,* 782 F.2d 565 (6th Cir.1986). An explanation may be in order.

In *Arthur v. City of Toledo, Ohio,* the Sixth Circuit considered a challenge to a referendum in which the voters repealed sewer extension ordinances which had been approved by their city council and which would have benefitted two low-income public housing projects. 782 F.2d 565. The Circuit first explained the lessons of *Hunter v. Erickson, James v. Valtierra, Arlington Heights,* and *Washington v. Seattle School District No. 1,* 458 U.S. 457,

102 S.Ct. 3187, 73 L.Ed.2d 896 (1982),[31] in which the Supreme Court balanced the democratic ideals embodied in referenda, with the people's right to the equal protection of the laws. After dutiful consideration of these and other substantial precedents, the Sixth Circuit held that "absent a referendum that facially discriminates racially, or one where although facially neutral, the only possible rationale is racially motivated, a district court cannot inquire into the electorate's motivations in an equal protection clause context." *Arthur,* 782 F.2d at 574; *see also United States v. City of Birmingham, Mich.,* 727 F.2d 560, 564 (1984), *cert. denied,* 469 U.S. 821, 105 S.Ct. 95, 83 L.Ed.2d 41 (1984) ("We do not read the opinion of the district court as dependent upon the motivation of voters in this referendum for its decision.").

Straight application of the *Arthur* holding to the case at hand might bar the Court from inquiring into the motivations of the citizen petitioners,[32] but the Court sees a distinction

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[31] In *Washington,* the Supreme Court held unconstitutional a statewide voter initiative designed to terminate the use of mandatory busing for purposes of racial integration in Washington's public schools. *Id.* While the initiative was facially neutral, the Court concluded that the initiative improperly reallocated "the authority to address a racial problem--and only a racial problem--from the existing decisionmaking body, in such a way as to burden minority interests." *Id.* at 474, 102 S.Ct. at 3197.

[32] Here, the Plaintiffs do not dispute that the site plan ordinance was facially race-neutral. Rather, the Plaintiffs argue that their right to the equal protection of the laws was violated because the City gave effect to the racially discriminatory will of its citizens. Applying the *Arthur* holding to this argument, the court would ask if racial bias is "the only possible rationale" for the citizen's

between inquiring into the thoughts of the voter at the voting box, and recognizing the stated motivations of citizens at public meetings and of those who organize and effectuate a petition drive. Where the former would involve the scrutiny of "people acting in a legislative capacity," the latter is simply an attempt to "gather additional information concerning the

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petition to which the Defendants gave effect. The answer to this question would surely be no. Other possible rationales for the citizens' petition (and subsequent referendum) include, for example, concern about the effect of low-income housing on property values of surrounding properties, or worries over increased demand on public services or schools.

Indeed, as far as this Court can tell, there will always be another non-race-based rationale for a referendum, and thus a court in the Sixth Circuit will never be able to inquire into the electorate's motivations. Even the factual scenario encountered by the Supreme Court in *Washington v. Seattle School District No. 1* would not survive the Sixth Circuit's strict test: while in *Washington,* the Supreme Court found that the facially neutral initiative "was effectively drawn for racial purposes," it also acknowledged the district court's finding "that voters were moved to support [the initiative] for 'a number of reasons,' so that it is impossible to ascertain all of those reasons or to determine the relative impact of those reasons upon the electorate." *Washington,* 458 U.S. at 464, 102 S.Ct. at 3192. If the *Washington v. Seattle School District No. 1* scenario took place within the jurisdictional boundaries of the Sixth Circuit today, the district court would not be allowed to make an inquiry into the racial basis for the initiative because of the District Court's acknowledgment that the rationales of the electorate were many and varied; Washington's anti-desegregation referendum would still be good law.

basis of opposition to the [ordinance]." *United States v. City of Birmingham, Mich.*, 538 F.Supp. 819, 829 (1982). True to the democratic ideals enunciated in *Arthur*, the Court will not interpret the words of a few as the will of the many, but will consider the stated motivations of some citizen petitioners as one factor in the broad context in which this dispute arose.

That groundwork having been laid, the Court has little trouble concluding that, when viewed in a light most favorable to the Plaintiffs, there is some evidence which would support Plaintiff's race-based equal protection claim. That is not to say that the Court finds that the evidence is of such strength that it compels an injunction in Plaintiffs' favor--that is not the question here--but the evidence is certainly sufficient to allow Plaintiffs' claim to survive summary judgment. The parties will be expected to present their views of that evidence, and its relevance to the *Arlington Heights* framework for establishing intent, at the trial.

Although this analysis also has serious implications for the efficacy of Plaintiffs' Fair Housing Act claims, the Court will address those claims separately. The Fair Housing Act, 42 U.S.C. § 3601, et seq., states that "it is unlawful to ... make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a); *see also* 42 U.S.C. § 3617. Familial status is defined as "one or more individuals (who have not attained the age of 18 years) being domiciled with (1) a parent or another person having legal custody of such individual or individuals...." This section has been held to apply to municipalities. *United States v. City of Parma, Ohio,* 661 F.2d 562 (6th Cir.1981).

One part of Plaintiffs' FHA claim asserts that by staying

the effectiveness of the site plan ordinance and consequently refusing to grant building permits pursuant to that ordinance, the city is giving effect to the anti-family and anti-minority biases of the citizen petitioners, and therefore violating § 3604(a) by making dwellings unavailable to potential home builders/buyers based on their race and on whether they have children under 18 years of age.

Again, Defendants only challenge the Plaintiffs' ability to prove discriminatory intent (the first requirement to be met in a discrimination claim). Plaintiffs attempt to satisfy their burden of proof on this question in two ways. First, they argue that intent can be shown pursuant to the same *Arlington Heights* analysis used to evaluate their equal protection claim. *See also Smith & Lee Assoc. v. City of Taylor, Mich.*, 13 F.3d 920, 927-28 (6th Cir.1993). The Court has already ruled that under this analysis there is sufficient evidence to create an issue of fact concerning whether discriminatory intent played a part in the injury allegedly suffered by Plaintiffs. While that ruling concerned Plaintiffs' race-based equal protection claim, a review of the evidence reveals a similar question of fact concerning the role of anti-family bias in the denial of Plaintiffs' site plan and requests for building permits. This alone is sufficient reason to deny Defendants' motion for summary judgment on Plaintiffs' fair housing claim.

However, the Court deems it wise to explain the alternative argument of the Plaintiffs that should they not succeed in satisfying the terms of the *Arlington Heights* analysis, they can demonstrate that the Defendants' actions have a disparate impact upon African-Americans and families. (Docket # 50, at 17-18 (citing *Arthur v. City of Toledo,* 782 F.2d 565 (6th Cir.1986); *Metropolitan Housing Development*

Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir.1977), *cert. denied,* 434 U.S. 1025, 98 S.Ct. 752, 54 L.Ed.2d 772 (1978)).) While it is true as Plaintiffs claim that under the Fair Housing Act, "even practices which unintentionally cause a disparate impact upon a protected class can be held unlawful[,]" the Court directs Plaintiffs' attention to the *Arthur* Court's holding that "absent highly unusual circumstances, the discriminatory *effect* of a referendum cannot establish a violation of the Fair Housing Act." *Arthur,* 782 F.2d at 575 (emphasis added). Although we cannot be certain what the Sixth Circuit meant by "highly unusual circumstances," we know that a Court should consider the following three factors:

> (1) the strength of the plaintiff's showing of discriminatory effect;
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> (2) the defendant's interest in taking the action complained of; and
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> (3) whether the plaintiff seeks to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.

Arthur, 782 F.2d at 575 (refusing to adopt Seventh Circuit's "discriminatory intent" factor because plaintiffs should not receive "half-credit" for failing to satisfy *Washington v. Davis* constitutional standard). Needless to say, this legal path takes Plaintiffs on an uphill climb. While Defendants unsuccessfully challenge the Plaintiffs' ability under the law to assert a disparate impact claim, they have not challenged the Plaintiffs' ability on the facts of this case to satisfy the *Arthur* criteria, thus the Court will leave for a

future date consideration of the evidence under this analysis.

Similarly, Plaintiffs' claim based on the Fair Housing Act, 42 U.S.C. § 3617, survives Defendants' motion for summary judgment. Section 3617 provides that

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by [the Fair Housing Act].

42 U.S.C. § 3617. The Sixth Circuit has interpreted this provision as restricting those "who are in a position directly to disrupt the exercise or enjoyment of a protected right and [who] exercise their powers with a discriminatory animus." *Michigan Protection and Advocacy Serv., Inc. v. Babin,* 18 F.3d 337, 347 (6th Cir.1994). "Under this standard, the language 'interfere with' encompasses such overt acts as racially-motivated firebombings, ... sending threatening notes, ... and less obvious, but equally illegal practices such as exclusionary zoning, ... deflating appraisals because of discriminatory animus, ... and insurance redlining...." *Id.* (citations omitted). In the instant case, Plaintiffs argue that the Defendants discriminatorily denied them of the site plan and building permits to which they were entitled due to the race and familial status of the project's future tenants. The ultimate determination of this issue depends on the same type of sensitive factual inquiry which the Court discussed above, and thus, the Court's conclusion is here the same: Plaintiffs have presented evidence which, when viewed in a light most favorable to them, could establish the claim asserted. Defendants' motion for summary judgment on this ground is

also denied.

VII. Mayor Robart, Individually.

According to the Plaintiffs, the Mayor violated their rights to Due Process and Equal Protection as protected by 42 U.S.C. Sections 1981, 1982, and 1983, and those rights protected by the Fair Housing Act. (*See* Complaint.) The actions of the Mayor which the Plaintiffs challenge include his express opposition to the Plaintiffs' proposed housing project, attendance at and alleged contributions to several meetings of citizens opposed to the project, and certification of the citizens' referendum opposing the project. (Docket # 49.) In his motion for summary judgment Mayor Robart offers at least four separate grounds which he believes entitle him to relief. The first, res judicata, has been discussed above. The second through fourth bases for the Mayor's motion include the doctrine of qualified immunity, the Mayor's assertion of an absolute privilege, and the assertion by the Mayor that Plaintiffs can offer no evidence that the Mayor in any way caused their alleged harms.

"Qualified or 'good faith' immunity is an affirmative defense that is available to government officials performing discretionary functions." *Rich v. City of Mayfield Heights,* 955 F.2d 1092, 1095 (6th Cir.1992). A state official is entitled to qualified immunity if his allegedly unlawful conduct was objectively reasonable when considered in light of the legal rules that were clearly established at the time the challenged conduct was taken, and of the information possessed by the official. *Id., quoting Anderson v. Creighton,* 483 U.S. 635, 639, 107 S.Ct. 3034, 3038-39, 97 L.Ed.2d 523 (1987). A plaintiff bears the ultimate burden of showing that the defendant is not entitled to qualified immunity once

the defendant has presented facts to suggest that his actions were in fact performed within the scope of his authority, *Rich,* 955 F.2d at 1095.

Thus, when faced with a motion for summary judgment based on qualified immunity, a court must consider the following two issues:

> (1) whether the plaintiff has asserted a violation of [a] known civil constitutional right; and
>
> (2) whether the constitutional rights was so clearly established at the time in question that a reasonable official in the defendant's position would have known that he was violating the plaintiff's constitutional rights.

Hutsell v. Sayre, 5 F.3d 996, 1003 (6th Cir.1993) (Suhrheinrich, J.), *cert. denied,* 510 U.S. 1119, 114 S.Ct. 1071, 127 L.Ed.2d 389 (1994), *citing Siegert v. Gilley,* 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991). If either question in the two part qualified immunity analysis is answered in the negative, summary judgment must be granted to the state actor as a matter of law.

In the present cause, the Court has already determined that Plaintiffs have asserted violations of their known federal rights pursuant to Section 1983, and the FHA. It is now left for this Court to determine whether the right was clearly established in May of 1996, that is, whether "[t]he contours of the right [were] sufficiently clear that a reasonable official would understand that what he [was] doing violates that right ..." *Anderson,* 483 U.S. at 640, 107 S.Ct. at 3039. This determination depends on whether there is controlling precedent in the Sixth Circuit or the Supreme Court of the

United States. *Marsh v. Arn,* 937 F.2d 1056 (6th Cir.1991); *Black v. Parke,* 4 F.3d 442, 445 (6th Cir.1993).

First, the Court must determine which conduct of the Mayor is actionable. Certainly, all of the claims brought by Plaintiffs against the Mayor in his individual capacity hinge on the Plaintiffs' ability to show that the Mayor actually did something which caused them harm. A review of the evidence cited by Plaintiffs reveals that there is no proof that the Mayor contributed to the referendum process aside from lending support by answering some procedural questions. Eventually, when the view of the electorate became obvious, he amplified their opposition to the project and, indeed, encouraged the City Council to oppose it "with vigor." (Robart depo. p. 63-5.) He suggested finding a legal way to preclude building the project; he advised that denying the permit would cause expensive delay which could work to the city's advantage. However, when push came to shove, that is, when Council ignored his advise and approved the site plan in question, the Mayor declined to exercise his veto power, instead allowing the ordinance to take effect without having to express any official approval or disapproval of it whatsoever.

Mayor Robart's position on the project admittedly shifted during the proceedings leading to the referendum, but at the critical time when he could have either directly helped or hurt the Plaintiffs' cause, the Mayor avoided taking any action and, instead, allowed the Plaintiffs' site plan ordinance to take effect due to his pocket approval. The facts in evidence do *not* sustain Plaintiffs' unsupported assertions that the Mayor organized the petition drive in question, that he secured meeting places for the citizen group opposed to the project, that he certified the petition, or that he submitted the

referendum question to the Board of Elections.

There does appear to be a question, however, concerning whether the Mayor caused the denial of Plaintiffs' request for a site plan or building permits. According to the Mayor, he asked the City Service Director to circulate a memo requesting that building permits not be issued to the Plaintiff developers. (Docket # 34, at 4, 8 (Robart aff. ¶ 15).) While the City Law Director had already issued a similar memorandum, the Court cannot help but conclude that there is a question of fact concerning whether the Mayor's memo was a cause of the denial of the Plaintiffs' building permits. It is this act of Mayor Robart, ordering the issuance of the memo, which the Court will analyze to determine if a reasonable official in the Mayor's position would understand that what he was doing violated the Plaintiffs' constitutional rights. *See Anderson,* 483 U.S. at 640, 107 S.Ct. at 3039.

The Court concludes that based on existing Supreme Court and Sixth Circuit precedent, a reasonable official would not necessarily understand the ramifications of his act on the federal rights of others.[33] That is, the Court finds that although the precedent might indeed compel a conclusion that the actions of the Defendants violated the federal rights of the

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[33] By "federal rights" the Court means to include the rights of Plaintiffs as protected by the Fair Housing Act. Just as there is no controlling precedent which directly provides the answer to the Mayor's constitutional dilemma, there is none which adequately explains the interplay between the Fair Housing Act and the right of the people to referenda. In short, the Mayor's denial of the Plaintiffs' requested building permits was not obvious under controlling precedent, and thus the Mayor may have reasonably believed that he was behaving lawfully. He is qualifiedly immune from Plaintiffs' Fair Housing claims.

Plaintiffs, no opinions of the Circuit or Supreme Court address the unique factual scenario which is now before the Court: a challenge to a city's arbitrary refusal to give effect to a site plan or issue building permits due to the alleged biases of citizen petitioners. Indeed, as the discussion above demonstrates, this dispute falls squarely in the middle between caselaw affirming the rights of citizens to referenda and other caselaw upholding the rights of individuals to be free from the arbitrary and irrational whims of the majority. A reasonable official in the Mayor's position might not have known that his actions affected the constitutional rights of others as those rights have been explained by the Supreme Court and the Sixth Circuit, and indeed, under a certain reading of the caselaw the Mayor might have felt that his actions were lawful. The Court, therefore, concludes that Mayor Robart is entitled to qualified immunity on Plaintiffs' claims against him in his individual capacity. Mayor Robart's motion for summary judgment is granted.

VIII. Conclusion.

The motions before the Court are those of the Defendants for *summary judgment*. As the parties are well aware, when considering such a motion, it is imperative for the Court to consider all of the evidence in a light most favorable to the non-moving party, here the Plaintiffs. After viewing the evidence in this manner, the Court agrees with the Defendants that they are entitled to judgment as a matter of law on two questions: first, the Court grants Defendants' motion insofar as it challenges Plaintiffs' non-race-based equal protection claim; second, because Defendant Robart is entitled to qualified immunity, Plaintiffs may not proceed against him in his individual capacity; the Mayor's motion for summary judgment is granted.

As for the balance of Defendants' motion, the Court finds that Plaintiffs have provided evidence which, if viewed in their favor, could demonstrate claims founded in due process, as well as claims based upon Plaintiffs' right to the equal protection of the laws as guaranteed by the Fourteenth Amendment, Section 1983, and the Fair Housing Act. This order does not contemplate whether Plaintiffs will ultimately succeed in their claims, rather it merely states that Plaintiffs should be afforded a trial at which they could fairly pursue them.

The legal controversy now before the Court is no simpler now than it was when first confronted by the City of Cuyahoga Falls in the spring of 1996. When deciding whether to give effect to its citizens' petition, the City of Cuyahoga Falls stood at the intersection of two concepts essential to our constitutional democracy: the rights of its citizens to self-government, that is, their right to challenge by petition and referendum the decisions of their elected representatives; and the rights of the Plaintiffs to the equal and non-arbitrary application of the laws. This Court now stands at that same crossroad, and is charged with reconciling those basic principles. It is hoped that, with the help of the parties, that reconciliation may soon be achieved.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT,
N.D. OHIO,
EASTERN DIVISION

February 14, 1997

No. 5:96 CV 1458

BUCKEYE COMMUNITY HOPE FOUNDATION, et al.,
Plaintiffs,

v.

CITY OF CUYAHOGA FALLS, et al.,
Defendants.

REPORT AND RECOMMENDATION

Magistrate Judge James Thomas

I. Introduction.

The above-referenced matter has been referred to the undersigned for a report and recommended decision on Defendants' pending motions for summary judgment (Docket Nos. 32 and 34). (See Order of November 21, 1996, Docket No.65).

This action involves the proposed development of a seventy-two unit apartment complex in the City of Cuyahoga Falls, Ohio. This is the second action involving this proposed development. The proposed development was the subject of a state suit filed on May 1, 1996, in Summit County Court of Common Pleas by the majority of the Plaintiffs before this court, including the project developer, Buckeye Community Hope Foundation. The present action was filed on July 5, 1996, by the developer, and others, after an unsuccessful attempt before the state court to halt a referendum effort in the City of Cuyahoga Falls to reverse the City's approval of the development. Plaintiffs in this action claim, *inter alia*, that the actions of the City, City officials, the Summit County Board of Elections, and the Mayor of Cuyahoga Falls in his individual capacity, violated Plaintiffs' rights under the Fair Housing Act, 42 U.S.C. 3601, *et seq.*, and other provisions of federal law.

For the reasons that appear below, the present suit was the subject of a prior state court action and is barred, on grounds of *res judicata*, as between the parties to this suit who were also parties to the state court action. Further, despite the presence of additional parties in this suit, the case should be dismissed in its entirety.

II. Background.

There are two areas of background relevant to the consideration of the pending motions: (1) the facts leading up to the proposed development, referendum and filing of this action; and (2) the procedural context of this action. The two areas are discussed separately below. Initially, however, one procedural matter warrants an introduction here.

United States District Judge Sam H. Bell conducted a

three day hearing on Plaintiffs' motion for preliminary injunction in November of 1996. This was the second hearing on Buckeye Community Hope Foundation's request for injunctive relief; a preliminary injunction hearing was also held in the state action. Plaintiffs' motion for injunctive relief filed in this court was denied on December 13, 1996. (Docket No. 78). On the motion of Plaintiffs, the transcript of those proceedings has been accepted for consideration in connection with the pending motions for summary judgment. (See Order of January 22, 1997, Docket No. 84). The three volume transcript was received by the undersigned on January 29, 1997 and has been considered in connection with the pending motions and is cited herein, in addition to the other evidentiary materials submitted by the parties.

A.

For purposes of background, the undersigned has relied upon, to the extent available, evidence offered by Plaintiffs because of the need, when considering a motion for summary judgment, to view the facts in the light most favorable to the non-moving party, *i.e.*, Plaintiffs. Specific areas of dispute are discussed in the report and recommendation as relevant.

* * *

Plaintiff Buckeye Community Hope Foundation ("Buckeye Community Foundation") is a not-for-profit 501(c)(3) corporation. (Hearing Transcript, November 19, 20, and 21, 1996 ("Tr.") at pp. 11-13). It has as its purpose the development of affordable housing through the use of low income housing tax credits. (*Id.*) Mr. Boone is the President of the Board of Trustees for Buckeye Community Foundation. (Tr. at p. 11).

Prior to the development of the complex in question here, Buckeye Community Foundation developed at least four other affordable housing complexes in Ohio. (Tr. at p. 15). As outlined at the hearing before Judge Bell by Mr. Boone and the Executive Director for Buckeye Community Foundation, Mr. P. Barno, Buckeye Community Foundation acts a developer for each project. (Tr. at p. 389). For each project, a separate limited partnership is formed as the investment vehicle to sell the tax credits. In this case, the specific limited partnership is Plaintiff Buckeye Community Three, L.P. ("Buckeye Three. Limited"). (Tr. at p. 23). The limited partnership is the owner of the land and, once it is completed, the development. As the project is developed, Buckeye Community Foundation advances fees and expenses until all the financing, including the tax credits, are finalized.[1] Once the complete financial package is arranged and finalized, Buckeye Community Foundation is reimbursed for its expenses in developing the project. Buckeye Community Foundation also receives a "developer's fee" for its services. In this case, the expected fee is $175,000.00. (Boone Dep. at p. 120; Tr. at p. 381).

To protect each development and its investors, Buckeye Community Foundation also forms a separate corporation to act as the general partner for the limited partnership. (Tr. at pp. 22-23). In this case, Plaintiff Cuyahoga Partners, Inc. ("Cuyahoga Partners"), a for-profit corporation, was formed

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[1] For example, in this case the $10,000 loan commitment paid to the bank by Buckeye Three Limited was advanced by Buckeye Community Hope Foundation. (Tr. at p. 397).

to serve as the general partner of Buckeye Three Limited.[2] (Tr. at p. 23).Mr. Boone is the president of Cuyahoga Partners. (Boone Dep. at pp. 6-7). Buckeye Community Hope Foundation is a fifty-one percent owner of Cuyahoga Partners, and the other forty-nine percent is owned by Little Country Community, Inc., another 501(c)(3) corporation. (Tr. at p. 396).

Thus, Buckeye Community Foundation controls Cuyahoga Partners which in turn controls Buckeye Three Limited.[3] (Tr. at pp. 23,389-390).

* * *

Turning to the events leading to the underlying dispute, Mr. Boone testified that he first contacted the Mayor for the City of Cuyahoga Falls, Donald Robart, in the summer of 1995 about the possibility of developing a low income housing complex in Cuyahoga Falls.[4] Mr. Boone testified that Hearing Exhibit 23 represents a letter from Buckeye Community Foundation to Mayor Robart dated June 7, 1995. In the letter, Buckeye Community Foundation expressed an interest in

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[2] The initial limited partners were RU Management Company and/or Steven Boone individually. (Tr. at p. 398). RU Management Company is "a management company that manages affordable housing in Ohio and elsewhere." (Boone Dep. at p. 7). There is an "understanding" that RU Management Company would manage the complex if it were built. (Tr. at p. 398). RU Management is owned by Mr. Boone. (*Id.*)

[3] Because of the commonality among these parties, at times they are referred to collectively as " Plaintiff Developers. "

[4] Donald Robart is named as a defendant in this action both in his individual and official capacities.

developing the land "under the low income housing tax credit program." (Tr. at pp. 20-21). Mr. Boone indicated that this letter was sent before the purchase of the land for the project. (Tr. at p. 21). According to Mr. Boone, the Mayor expressed no problems about the proposed development at that time. (*Id.*)

The real property, located on Pleasant Meadow Boulevard, was purchased on June 12, 1995. (Complaint at para. 13).

Mr. Boone testified that he started working with Cuyahoga Falls Planning Director, Louis Sharpe, in late August/September of 1995 on the details of the development. (Tr. at pp. 30-31). The financing for the project was secured in November of 1995. (Tr. at p. 21).

In January, 1996, Buckeye Three Limited, ruled an application for a "site plan review" for the seventy-two unit apartment complex in the City of Cuyahoga Falls. (Complaint at para. 15).

On February 21, 1996, the "site plan" was submitted for approval at a meeting of the Planning Commission for Cuyahoga Falls. (Complaint at para. 17; Tr. at p. 33). In connection with the Planning Commission's meeting, the Planning Director Sharpe prepared a Staff Summary of the site plan. See Hearing Exhibit II; Tr. 128).This summary recommended approval of the site plan subject to approximately nine conditions agreed to by Mr. Boone. One of the conditions required the developers to erect a fence on one side of the property before the building permit for the apartment complex could issue.

The site plan, including the conditions, was unanimously

approved by the Planning Commission at the February 21, 1996 meeting.[5] (Complaint at para. 17; Tr. at p. 35). The Planning Commission's recommendation then had to be submitted to and approved by City Council. (*Id.*) Mayor Robart did not attend the February 21, 1996, Planning Commission meeting. (Tr. at pp. 72-73).

On March 4, 1996, the Planning Commission's recommendation on the site plan was addressed at a City Council meeting. (Tr. at p. 35). Mayor Robart attended this meeting. (Tr. at p. 36). According to Mr. Boone, Mayor Robart "came out against" the project during this meeting and suggested that the issue be tabled. (Tr. at p. 39-40). The issue was tabled.[6] (Tr. at p. 40).

Another meeting of City Council was held on March 18, 1996. (Tr. at p. 40).From a review of the materials filed in connection with the motions, one can conclude that this meeting was long and emotional. The minutes reflect that the meeting lasted from 6: 15 p.m. until 8:45 p.m. and that several residents expressed their concerns over the development of the complex. Mayor Robart attended the March 18, 1996 meeting and expressed his views in a lengthy statement. (Hearing Exhibit 24 at pp. 12-14).

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[5] Hearing Exhibit 11 sets forth the conditions prerequisite to the issuance of the building permit as approved by the Planning Commission and as adopted by City Council. (Tr. at p. 90).

[6] Mr. Boone indicated that while he was not aware of any referendum in the works, he recalled the word being used by the City Law Director at either the March 4 or March 18 City Council meeting. (Tr. at p. 41-42). Mr. Boone testified that the word referendum "went right over my head" and he did not understand what a referendum was until April. (*Id.*)

According to Mr. Boone, Mayor Robart recommended rejecting the project at the March 18, 1996 Council meeting. (Tr. at p. 43). The issue was tabled again. Mr. Boone testified, "I believe they said the reason was because they wanted the law department to provide a legal opinion if there was any possible reason, the way it was put, that they could turn us down legally. " (Tr. at p. 43). Mr. Boone admitted that he raised the Fair Housing Act at the March 18, 1996 meeting. (Tr. at p. 60; Boone Dep. at p. 16).

Another Council meeting occurred on April 1, 1996, and the site plan was approved by vote of six to three. (Complaint at para. 19; Tr. at p. 43). The City Council's approval was expressed in the form of Ordinance No. 48-1996. Ordinance No. 48-1996 states, in pertinent part:

> [t]hat this City Council approves the plan for development of land situated in an R-17 Medium Density Multiple Family zoning district in accordance with such district and zoning regulations as stipulated in the Codified Ordinances of the City of Cuyahoga Falls and as approved by the Planning Commission as per the plans and stipulations contained in Planning Commission File P-6-96-SP.

(Hearing Exhibit No.8, Section 1).

Mr. Boone testified that they applied for the building permit about two days after the site plan was approved. (Tr. at p. 44). Upon direct questioning by Judge Bell, Mr. Boone stated that the application was made on either April 3 or 4. (*Id.*) The complaint alleges that the building permit was sought on or about April 5, 1996. (Complaint at para. 29).

Mr. Boone testified that they received the building permit

for the fence in April, 1996. (Tr. at pp. 46-48). Mr. Boone testified that work on the fence did not begin "because it became pretty obvious that we are in a fight, and I wasn't about to --first of all, we don't have the funds to put up a $70,000 fence. If we know we are going to receive with assurity the building permit to build the rest of the project, I — that's basically the reason." (Tr. at p. 48). Mr. Boone further stated that he did not proceed with building the fence because "the rumors of a referendum were very prevalent." (Tr. at p. 92). He testified, "1 felt the reasonable thing to do was to delay the construction of the fence until I was assured we were going to get a building permit. " (Tr. at p. 92).

* * *

Parallel to the site plan approval process, a referendum effort was proceeding. (See Complaint at para. 24).

Mr. Lee Minier is a life long resident of Cuyahoga Falls, Ohio. (Tr. at p. 266).He was called by Plaintiffs to testify at the hearing before Judge Bell. Mr. Minier testified that Hearing Exhibit 19 is a notice for meeting on Tuesday, April 9, 1996 to discuss "taking the ISSUE OF A 72 UNIT HOUSING DEVELOPMENT ON PLEASANT MEADOW BLVD. to the vote of the people of Cuyahoga Falls in November." (Hearing Exhibit 19) (upper case print in original) (Tr. at p. 278-279). The organizing group, as identified on Hearing Exhibit 19, was the" Citizens for the Preservation of Voters Rights." (See Exhibit 19).

Mr. Minier attended the April 9, 1996 meeting. The Mayor also attended the meeting. (Tr. at p. 279). The Mayor spoke at the meeting and stated that he supported the referendum effort. *Id.*) According to Mr. Minier, no City of Cuyahoga Falls officials were asked to sign the referendum

petitions.(*Id.*)

Mr. James Kuzmik, a "tester" for the Fair Housing Advocates Association, also attended the April 9, 1996 meeting. (Tr. at p. 291). According to Mr. Kuzmik, the director of Fair Housing Advocates Association called him and asked him to attend the meeting.[7]) Mr.Kuzmik testified that the referendum process was discussed at this meeting. Mr.Kuzmik was asked, "were there any statements made by members of the Citizens for the Preservation for Voter [Rights,] dealing with children?" Mr. Kuzmik said yes. (Tr. at p. 293). Mr. Kuzmik said he did not recall anyone person leading the meeting. (Tr. at p. 296). On cross examination, Mr. Kuzmik stated that he did not hear Mayor Robart make any discriminatory remarks about African Americans or children at the April 9, 1996 meeting.[8] (Tr. at p. 300).

On or about April 29 or 30, 1996, a referendum petition was submitted to the Clerk of Council, Gregg Wagner.[9] (Complaint at 25; Wagner Affidavit at para. 5). The Board of Elections approved the referendum petition on May 1, 1996. (Complaint at paras. 25 and 26; Wagner Affidavit at 5).

* * *

On May 1, 1996, the state action was filed to enjoin the

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[7] Mr. Kuzmik is not a member of Fair Housing Contact Services. (Tr. at p. 291). Fair Housing Advocates Association is a distinct entity separate and apart from Plaintiff Fair Housing Contact Service.

[8] Mr. Kuzmik's handwritten notes taken during the meeting are at Hearing Exhibit 32. (Tr. at p. 298).

[9] Mr. Wagner is named in this lawsuit as a defendant in his official capacity as the Clerk of Council.

referendum process under Ohio law. The case was captioned: *Buckeye Community Hope Foundation. et al.. v. City of Cuyahoga Falls. et al.*, Case No. CV96-05-1701 (Summit County) (I. Murphy). The named plaintiffs were Buckeye Community Foundation, Cuyahoga Partners, and Buckeye Three Limited, three of the four named plaintiffs in this action. (See "Complaint for Temporary Restraining Order Declaratory Judgment Injunctive Relief," Docket No. 33, Exhibit C). The state court complaint named as defendants: (1) City of Cuyahoga Falls; (2) Cuyahoga Falls City Council; (3) Gregg Wagner, Clerk of City Council, City of Cuyahoga Falls; and (4) Summit County Board of Elections. (Docket No. 33, Exhibit C). With the exception of the Cuyahoga Falls City Council, the same defendants have been named in this action.

On May 15, 1996, Judge Murphy conducted a hearing on plaintiffs' request for preliminary injunction. (Docket No. 33, Exhibit F). At the hearing, plaintiffs presented the testimony of three witnesses: (1) Mr. Boone; (2) Joseph James Orel, President of no Construction, the contractor for the project; (Docket No. 33, Exhibit F, p. 13); and (3) Roy Lowenstein, a representative of Ohio Capital Corporation for Housing. (Docket No. 33, Exhibit F, p. 17). Mr. Boone and Mr. Orel also testified at the hearing before Judge Bell in November, 1996.[10] (Tr. at pp. 11-106; pp. 109-

[10] Several other witnesses testified at the hearing including Louis Sharpe (Tr. at pp. 121-158), Sandra Montgomery (Tr. at pp. 158-164), Crystal Williams (Tr. at pp. 165-169), Kathy Ronca (Tr. at pp. 169-180), Julia Neal (Tr. at pp. 180-185), Gerald Dzurilla (Tr. at pp. 186-198), Dr. Mark Sailing (Tr. at pp. 201-252), George Potts (Tr. at pp. 253-266), Lee Minier (Tr. at pp. 266-288), lames Kuzmik (Tr. at pp. 289-300), Donald Robart

121). The plaintiffs in that action were represented by Edward G. Kramer, who also represents Plaintiffs in this action as well. (Docket No. 33, Exhibit C).

On May 31, 1996, Judge Murphy denied the plaintiffs' motion for preliminary or permanent injunction."[11] (Docket No. 33, Exhibit B). The decision and judgment was "on the merits." (Docket No. 33, Exhibit F, pp. 48-49; also, Attachment to Docket No. 77 — Ninth Appellate District's December 11, 1996 opinion at p. 3 ("The parties agreed to consider the hearing as a trial on the merits of the case.")).

* * *

On June 20, 1996, Mr. P. Gilbertson Barno, Buckeye Community Foundation's Executive Director wrote to City of Cuyahoga Falls and renewed his request for issuance of a building permit. (Hearing Exhibit No.16). On June 26, 1996, Mr. Gerald M. Dzurilla, the City Engineer for Cuyahoga Falls, sent a letter to Mr. Barno and indicated that he could not issue the building permit in light of the pending

(Tr. at pp. 301-338), and Peter Gilbertson Barno (Tr. at pp. 359-404). The testimony of each witness has been read and considered by the undersigned. The relevant testimony is discussed infra to the extent necessary.

[11] Plaintiffs appealed Judge Murphy's decision and on December 11, 1996, the Ninth Appellate District affirmed the decision of the trial court. The record does not indicate whether an appeal of the Ninth Appellate District's December 11, 1996 decision has been taken to the Ohio Supreme Court.

referendum.[12] (Complaint at para. 31 ; Hearing Exhibit No.15).

Plaintiffs filed the present action on July 5, 1996 naming as Plaintiffs the three plaintiffs in the state court action, plus one new Plaintiff, Fair Housing Contact Service. The Defendants in this action are: (.1) City of Cuyahoga Falls; (2) Don Robart, in his individual and official capacity as Mayor of the City of Cuyahoga Falls; (3) Gregg Wagner, in his official capacity as Clerk of City Council; (4) Summit County Board of Elections; and (5) Gerald M. Dzurilla, in his official capacity as Chief City Engineer. (Docket No.1). The new Defendants, *i.e.*, those not named in the prior state suit, are Mayor Robart in his individual and official capacity, and Mr. Dzurilla in his official capacity.

In contrast to the complaint filed in state court, the complaint filed in this court is based upon federal law. The Plaintiffs allege violations of 42 U.S.C. 3601 *et seq.*, 3604, and 3617, 42 U.S.C. 1981 and 1982 (Docket No.1, para. 37); the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. 1983 (paras. 39, 44); and the Equal Protection Clause of Fourteenth Amendment and 42 U.S.C. 1983 (para 41). The complaint filed in the prior state action was based solely on state law.

B.

Before turning to the merits of the pending motions, two procedural matters are relevant to the discussion set forth below.

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[12] Gerald Dzurilla is named in this lawsuit as a defendant in his official capacity as "Chief City Engineer."

First, as noted above, this action was filed on July 5, 1996. Subsequent to the filing of the action the parties engaged in discovery and filed their respective motions for summary judgment and responses thereto prior to the preliminary injunction hearing conducted by Judge Bell on November 19, 1996. Judge Bell issued an order on December 13, 1996 denying Plaintiffs' request for equitable relief primarily on the ground that Plaintiffs failed to establish any irreparable harm.

On December 19, 1996, Plaintiffs filed a motion requesting that the preliminary injunction hearing transcript be submitted as a supplement to the pending motions and further briefs be permitted. Judge Bell sustained the request to supplement the record with the transcript but denied the request for additional briefing. Thus, in addition to the depositions cited by the parties, the undersigned has considered the evidence submitted at the preliminary injunction hearing as that evidence is reflected in the transcripts and exhibits.

Second, the respective motions, responses and replies were not all "filed" in a standard sequence because leave of court was necessary for some of the filings. Thus, the date of filing for each pleading, as reflected on the docket, is not consistent with the substantive sequence one would expect. Therefore, in an effort to assist a reviewing court, the substantive sequence of the relevant motions, responses, and replies is as follows:

1. "Motion for Summary Judgment on behalf of City of Cuyahoga Falls, Don Robart, in his official capacity, Gregg Wagner, and Gerald Dzurilla " (Docket No. 32). See also, "Exhibits in Support.

of Defendants' Motion for Summary Judgment" (Docket No.33).

2. "Motion for Summary Judgment by Defendant Robart in his Individual Capacity" (Docket No.34).

3. "Reply of Plaintiffs to Defendants' Motion for Summary Judgment" (Docket No. 50). See also Exhibits "A" through "K" (Docket No.40).

4. "Reply of Plaintiffs to Defendant Robart's Motion for Summary Judgment" (Docket No.49). See also Exhibits " A " through "K" (Docket No.40).

5. "Reply Brief of City of Cuyahoga Falls, Don Robart, in his official capacity, Gregg Wagner, and Gerald Dzurilla in Support of their Motion for Summary Judgment" (Docket No.51).

6. "Defendant Robart's Reply to Plaintiffs' Brief in Opposition to Motion for Summary Judgment" (Docket No.46).

With these two procedural items in mind and the background set forth above as context, the merits of the pending motions are addressed below.

III. Discussion.

Defendants, other than Mayor Robart in his individual capacity, moved for summary judgment on several grounds. See Docket No.32). Defendants argue that they are entitled to summary judgment on the basis of *res judicata*, judicial

immunity, failure to state a claim, lack of any discriminatory intent, and that the Fair Housing Act is unconstitutional as applied. Defendant Robart has also moved for summary judgment and asserts nearly the same arguments but also argues that at all times he acted in his official capacity.(See Docket No. 34). Plaintiffs have opposed each and every ground advanced in support of the motion for summary judgment.

As discussed in more detail below, because the *res judicata* claim raised by the Defendants other than Robart individually is largely dispositive of this case, it is not necessary to address every argument raised in the summary judgment motions. Thus, in Section A below, the *res judicata* issues are discussed first. In Section B, Plaintiffs' claims against Defendant Robart individually are addressed. Finally, in Section C, Fair Housing Contact Service's standing to assert the claims in this case is addressed.

A. Res judicata.

Initially, it is important to pause and clearly distinguish between the two primary types of *res judicata*: claim preclusion and issue preclusion. *In Barnes v. McDowell*, 848 F.2d 725 (6th Cir. 1988), cert denied, 488 U.S. 1007 (1984), the Sixth Circuit Court of Appeals distinguished the types of *res judicata* by noting the United States Supreme Court's decision in *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984), stating:

> *Res judicata* is often analyzed further to consist of two preclusion concepts: "issue preclusion" and "claim preclusion. " Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. This effect is also

> referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of the determination that it should have advanced in an earlier suit. Claim preclusion therefore encompasses the law of merger and bar.

Barnes, 848 F.2d at 728, n. 5 (quoting *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n. 1 (1984). The Sixth Circuit further commented that "[s]ome commentators and court decisions have used the term '*res judicata*' as being virtually synonymous with claim preclusion. " *Barnes*, 848 F.2d at 728, n. 5 (internal quotations omitted). Thus, "claim preclusion" is the equivalent of "*res judicata*"; "issue preclusion" is the equivalent of "collateral estoppel. " Claim preclusion is relevant to the inquiry here.

In *Barnes*, the Sixth Circuit explained that to determine the preclusive effect of a prior state judgment, a federal court must look to state law. The Sixth Circuit explained that "section 1738 of Title 28 of the United States Code requires that federal courts afford state court judgments both the issue and claim preclusive effects in subsequent actions under 42 U.S.C. 1983 that the state courts would afford them. 848 F.2d at 730 (citations omitted).

In *Grava v. Parkman Township*, 73 Ohio St. 3d 379 (1995), the Ohio Supreme Court held: "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." 73 Ohio St. 3d at 379, syllabus by the court. In so holding, the Ohio Supreme Court expressly overruled paragraph two of the court's syllabus in *Norwood v. McDonald*, 142 Ohio

St. 299 (1943), previously the leading Ohio case on the issue of *res judicata*.

In *Grava*, the Ohio Supreme Court traced the court's prior holdings on the doctrine of *res judicata*. 73 Ohio St. 3d at 381-82. The Ohio Supreme Court explained that:

> With regard to the claim-preclusive effect of the doctrine of *res judicata*, this court, in previous years, has stated: "A final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction * * * is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them." *Norwood v. McDonald* (1943), 142 Ohio St. 299, 27 0.0. 240, 52 N.E. 2d 67, paragraph one of the syllabus; see, also, *Whitehead v. Gen. Tel. Co.*, [20 Ohio St. 2d 108 (1969)], paragraph one of the syllabus. We have also stated: "A judgment or decree in a former action does not bar a subsequent action where the causes of action are not the same, even though each action relates to the same subject matter." *Norwood*, *supra*, paragraph two of the syllabus; see, also, *Whitehead*, *supra*, paragraph two of the syllabus. To determine whether a second action was barred by this rule of law, one of the primary considerations was the identity of the evidence necessary to sustain each action. See *Norwood*, *supra*, paragraph four of the syllabus.

73 Ohio St. 3d at 381. The Ohio Supreme Court also explained "[i]n recent years, this court has not limited the application of the doctrine of *res judicata* to bar only those subsequent actions involving the same legal theory of

recovery as a previous action." 73 Ohio St. 3d at 382.

Finally, the Ohio Supreme Court held:

> [t]oday, we expressly adhere to the modem application of the doctrine of *res judicata*, as stated in 1 Restatement of the Law 2d, Judgments (1982), Sections 24-25, and hold that a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action. Therefore, we overrule the second paragraph of the syllabus in *Norwood*, *supra*, and overrule the second paragraph of the syllabus in Whitehead, supra, to the extent it is inconsistent with today's holding.

73 Ohio St. 3d at 382.

In *Shelar v. Shelar*, 910 F. Supp. 1307 (N.D. Ohio 1995), United States District Judge Carr reviewed and applied Grava. Judge Carr noted that "[p]reviously, *res judicata* did not always bar a subsequent action based upon a different legal theory." 910 F. Supp. at 1312, n. 3 (citation omitted). Judge Carr explained that:

> The Supreme Court of Ohio recently adopted "the modern application of the doctrine of *res judicata*, as stated in 1 Restatement of the Law 2d, *Judgments* (1982), Sections 24-25." *Grava v. Parkman Township*, 73 Ohio St.3d 379, 382, 653 N.E.2d 226 (1995). Consequently, "a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Id.*
>
> In *Grava*, the plaintiff sought a zoning certificate for

> a nonconforming use. Earlier, he had unsuccessfully sought a certificate for the same planned building at the same site. He had asserted then, however, that he was entitled to a variance.
>
> The Ohio Supreme Court held that the judgment denying the first request precluded the second request. It was immaterial that *Grava* based the second request on a different "theory of substantive law." *Id.* at 383, 653 N.E.2d 226. A judgment, the court explained, bars later assertion of "all claims which...might have been litigated" in the initial action. *Id.* at 382, 653 N.E.ld 226 (*quoting National Amusements, Inc. v. Springdale*, 53 Ohio St.3d 60, 62, 558 N.E.2d 1178 (1990". Hence a judgment precludes claims premised on a different legal basis, including claims that "would emphasize different elements or the facts." *Id.* 73 Ohio St.3d at 382-83, 653 N.E.2d 226 (*quoting* Restatement (Second) of Judgments, Section 24, comm. c at 200). A plaintiff must "present every ground for relief in the first action, or be forever barred from asserting it. " *Id.* at 382, 653 N.E.2d 226 (*quoting National Amusements*, 53 Ohio St.3d at 62, 558 N.E.2d 1178).

Shelar, 910 F. Supp. at 1311-12 (footnotes omitted) (italics in original).

In addition," [t]or the claim-preclusive aspect of *res judicata* to apply, the parties in a subsequent action must be identical to or in privity with the parties in the first action. " *Deaton v. Burney*, 107 Ohio App. 3d 407, 411 (1995).

The first task, therefore, is to determine whether the state suit filed May 1, 1996 in Summit County Common Pleas

Court concerns the same "transaction" as the suit filed in this court on July 5, 1996. As set forth below in subsection (i) the undersigned concludes that the two suits concern the same "transaction. " The next task is to identify the" identical parties " in the present suit, *i.e.*, the parties in this action who were also parties in the state court action, and those parties in privity with the identical parties. The latter two issues are addressed in subsections (ii) and (iii) below.

(i) "same transaction"

A "transaction" is defined as a "common nucleus of operative facts." *Grava*, 73 Ohio St. 3d at 382 (quoting Comment b to section 24 of the Restatement of Judgments). In *Grava*, the Ohio Supreme Court stated:

> Section 25 of the Restatement of Judgments, *supra*, at 209, further explains: "The rule of 24 applies to extinguish a claim by the plaintiff against the defendant *even though the plaintiff is prepared in the second action (1) To present evidence or grounds or theories of the case not presented in the first action, or (2) To seek remedies or forms of relief not demanded in the first action.*"

Grava, 73 Ohio St. 3d at 383 (italic in original).

In addressing this issue, the facts as alleged in the complaints must be examined. Plaintiffs' specific arguments as to whether this case involves the same transaction are also addressed.

(a.)

The complaint filed in this action and the complaint filed in the state action contain nearly identical factual allegations. The complaints differ from each other in only one material respect. The complaint in this action is based upon federal law, while the complaint in the earlier action was based on state law. The critical inquiry, however, is whether both complaints are based upon the same set of operative facts. To answer that question, both complaints must be compared.

A comparison of the federal complaint and the state complaint reveals a strong similarity between the factual allegations in the two complaints. In the federal complaint, the alleged chain of events leading to the complaint are set forth in the "Statement of Facts" portion of the complaint at paragraphs 12 through 31. (Docket No.1). In the state complaint, the corresponding factual allegations are set forth in paragraphs 6, and 11 through 24. (Docket No.33, Exhibit C). Paragraphs 12 through 20 and 23 through 27 of the federal complaint repeat the allegations set forth in paragraphs 6, and 11 through 24 of the state complaint, in some cases almost verbatim. The point is represented best by a "side-by-side" comparison. Such a comparison is set out in the Appendix to this Report and Recommendation.

Paragraphs 21, 22, and 28 through 31 of the federal complaint do not repeat factual allegations made in the state complaint. However, these non-repetitive paragraphs in the federal complaint do not alter the conclusion that the federal complaint and the state complaint concern a "common nucleus of operative facts."

In paragraph 21 of the federal complaint, Plaintiffs allege that "[t]he City Council passed Ordinance #48-1996 as an

emergency measure, to take effect immediately." While not stated as such in the state complaint, the substance of this allegation was set forth in the state complaint in paragraph 17 and Exhibit C to the complaint, *i.e.*, an attached copy of the April 1, 1996 ordinance. More importantly, however, the allegation in paragraph 21 of the federal complaint concerns an event which occurred prior to May 1, 1996, *i.e.*, the date the state complaint was filed, and was an event known to Plaintiffs at that time. Thus, the allegation does not concern a "new event," leaving aside the more important question whether it is outside the "nucleus of operative facts" with which the state complaint was concerned.

In paragraph 22 of the federal complaint, Plaintiffs allege:

> Article IX, Section 2 of the Cuyahoga Falls City Charter states that emergency ordinances and resolutions are eligible for referendum, "except that such emergency ordinances and resolutions shall go into effect at the time indicated therein."

(Docket No.1, para. 22). Again, this allegation relies upon information already in existence at the time the state complaint was filed and thus does not concern a new event.

In paragraph 28 of the federal complaint, Plaintiffs allege:

> The City Council failed to take any action within thirty days of receiving the returned petitions. Thus, pursuant to the City's municipal charter Article IX, the referendum was placed on the ballot for a vote of the electors of the City of Cuyahoga Falls in the November 1996 General Election by the Defendant Summit County Board of Elections.

(Docket No.1, para. 28). It is not disputed that the petition was returned to the Clerk of City Council on or about May 1, 1996, the date the state complaint was filed. It is disputed, however, whether City Council failed to take any action within the next thirty days. Compare, 28 of Plaintiffs federal complaint (Docket No.1), para. 2, Answer of Robart individually (Docket No.13), and para. 1, Answer of other Defendants (Docket No.15). That dispute concerns the period following May 1, 1996, and thus, in some sense, concerns a post May 1, 1996 event. However, plaintiffs in the state action were clearly aware of the prospect of the referendum being placed on the November, 1996 ballot, as they filed the May 1, 1996 complaint to prevent that very event from occurring. Paragraph 28 of the federal complaint therefore does not concern a different "nucleus of operative facts" than the state complaint.

In paragraph 29 of the federal complaint, Plaintiffs allege that, "[o]n or about April 5, 1996, Plaintiff Developers applied to the City for building permits necessary to commence construction pursuant to Ordinance #48-1996, " On its face, this allegation concerns an event which occurred prior to May 1, 1996 and is information that was known to the Plaintiffs at the time.

In paragraph 30 of the federal complaint, Plaintiffs allege that" [o]n information and belief, Defendant Mayor Robart, working through the city law department, informed Defendant Gerald Dzurilla that no permits for work authorized by Ordinance 48-1996 should be issued. " This allegation is in dispute. Plaintiffs do not, however, allege in paragraph 30 precisely when, allegedly, Mayor Robart told Dzurilla not to issue a building permit.

At the November 19, 1996 hearing before Judge Bell, however, Mr. Boone testified that Mayor Robart spoke out against the proposed apartment complex at the March 4, 1996 and March 18, 1996 council meetings and indicated that he would seek to delay the project. (Tr. at pp. 39-43). Mr. Boone attended both meetings. According to Mr. Boone, Mayor Robart indicated at the March 18, 1996 meeting that he would ask the City's law department to find a way to "turn us down legally." (Tr. at p. 43).

Mr. Boone further testified at the November 19, 1996 hearing that his company had received a building permit for a fence that the City required in connection with the project "sometime, I believe, in April," *i.e.*, April, 1996. (Tr. at pp. 47-48). Mr. Boone gave the following explanation as to why the fence was not built:

> Q: And have you built the fence?
>
> A: No, we have not.
>
> Q: Why haven't you built the fence?
>
> A: *Well. because it became pretty obvious that we are in a fight*, and I wasn't about to — first of all, we don't have the funds to put up a $70,000 fence. If we know we are going to receive with assurity the building permit to build the rest of the project, I — that's basically the reason.

(Tr. 48)(emphasis added). At his September 30, 1996 deposition, Mr. Boone testified that he believed he became entitled to a building permit on April 11, 1996. (Boone Dep. at p. 25).

The foregoing testimony leads to the conclusion that Mr. Boone knew prior to the filing of the state complaint on May 1, 1996 that Mayor Robart was against the proposed apartment complex, and that the building permit for the apartment complex was in jeopardy. Again, the allegation in paragraph 30 of the federal complaint is that, "[o]n information and belief, Defendant Mayor Robart, working through the city law department, informed Defendant Gerald Dzurilla that no permits for work authorized by Ordinance 48-1996 should be issued. " That the building permit was not forthcoming, however, was apparent to Mr. Boone in April, 1996, *i.e.*, prior to the filing of the state complaint. Paragraph 30 of the federal complaint thus does not concern an event outside the "nucleus of operative facts" which gave rise to the state complaint.

In paragraph 31 of the federal complaint, Plaintiffs allege that "[o]n or about June 26, 1996, Defendant Dzurilla sent a letter informing Plaintiff Developers that building permits would not issue due to the referendum petition." The record indicates that the June 26, 1996 letter was sent in response to a June 20, 1996 letter from P. Gilbertson Barno, Executive Director of Buckeye Community Hope Foundation. In the June 20, 1996, letter, Barno stated:

> On April 5, 1996, on behalf of Buckeye Community Three L.P., we submitted an application for a building permit for Pleasant Meadows Apartments, a 72-unit apartment development slated for construction on Pleasant Meadows Boulevard, Cuyahoga Falls. We have been advised that you are not processing this application because of a pending referendum vote which seeks to overturn the site plan approval which this project has received.

> Under the authority of *Gibson v. City of Oberlin*, 171 OS 1 (1960), Buckeye Community Hope Foundation, acting on behalf of Cuyahoga Housing Partners, Inc., General Partner of Buckeye Community Three L.P., under the terms of a closely-held corporation agreement, hereby makes demand that you forthwith issue the building permit referenced above or show just cause why the building permit should not be issued.
>
> Please reply to this correspondence promptly because of the severe time constraints under which the development must proceed. Thank you.

(Hearing Exhibit No.16). On June 26, 1996, Dzurilla responded:

> The Codified Ordinances of the City of Cuyahoga Falls prohibit me from issuing a building permit for a project that is not in compliance with the Zoning code. The site plan approval you claim to have received from City council is currently the subject of a referendum. By Charter, the ordinance granting that site plan approval does not take effect unless it is approved by the voters. It is my understanding that the Summit County Common Pleas court has ruled on the referendum issue, and upheld the Charter. Accordingly, there is no site plan approval as required in the Zoning code, and I am prohibited by law from issuing a building permit.

(Hearing Exhibit No.15).

Mr. Dzurilla's June 26, 1996 letter does not fall outside the "common nucleus of operative facts" which gave rise to

the state complaint, *i.e.*, the issuance of the building permit for the apartment complex. On the contrary, the June 26, 1996 letter concerns precisely that matter. Moreover, the June 26, 1996 letter was prompted by Mr. Barno's June 20, 1996 letter. That letter, in turn, apparently represents a "demand letter" foreshadowing the filing of the federal complaint on July 5, 1996. The June 26, 1996 letter, and the June 20, 1996 letter that prompted it, merely represent another step in the effort to obtain the building permit — an effort which began prior to May 1, 1996.

In sum, as set forth above, paragraphs 12 through 20 and 23 through 27 of the federal complaint repeat the allegations set forth in paragraphs 6, and 11 through 24 of the state complaint. Further, while paragraphs 21, 22, and 28 through 31 of the federal complaint do not repeat allegations made in the state complaint, they also do not alter the conclusion that the federal complaint and state complaint concern a "common nucleus of operative facts," *i.e.*, the facts surrounding the issuance of the building permit for the apartment complex.

The leading Ohio case on principles of *res judicata*, *Grava v. Parkman Township*, 73 Ohio St. 3d 379 (1995), involved an analogous situation. In deciding that two applications for a zoning certificate involved one "transaction," the Ohio Supreme Court stated:

> We hold that Grava's second application for a zoning certificate is barred by the doctrine of *res judicata*. Grava's second application is based on a claim arising from a nucleus of facts that was the subject matter of his first application. *In both instances, Grava was attempting to construct exactly the same building on the same tract of land*, which had fewer acres than

> Section 404.4 of the local zoning ordinance required. *In fact, the only difference between the two applications is the theory of substantive law under which Grava sought relief.*

73 Ohio St. 3d at 383 (italic in original) (emphasis added).

The present case likewise involves two attempts to construct the same building on the same tract of land. In the first attempt, the plaintiffs filed suit on May 1, 1996 in Summit County Common Pleas Court. The second attempt is the case presently before the court. The only real difference between the state and federal suits is the substantive theories of law under which relief is being sought. The earlier action was based upon Ohio law, while in the present case, Plaintiffs ground their claims in federal law.[13]

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[13] Plaintiffs cite *Truax v. EM Industries. Inc.*, 107 Ohio App. 3d 210 (1995) and *LaSalle National Bank of Chicago v. County of DuPage*, 856 F.2d 925 (7th Cir. 1988), cert. denied 489 U.S. 1081 (1989), in support of the proposition that this case involves more than one "transaction." Both cases are distinguishable, however. In *Truax*, the issue was the preclusive effect in state court of an arbitrator's ruling, under a collective bargaining agreement, which denied a worker's grievance that she had been wrongfully discharged for filing a fraudulent workers. compensation claim. The state appellate court concluded that the worker could claim in state court that the retaliatory discharge violated Ohio Revised Code 4123.90, but the court's analysis relied heavily upon a line of cases arising in the context of collective bargaining agreements. Plaintiffs have not demonstrated why a similar rationale is applicable in this case. While *LaSalle National Bank of Chicago v. County of DuPage*, 856 F.2d 925 (7th Cir. 1988), like this case, involved the proposed use of a parcel of land, there was, as Defendants argue, a lengthy history in that case involving several clearly distinct

(b.)

In an effort to show that this action involves a different transaction than that which was at issue in the state action, Plaintiffs argue that:

> [i]n the Summit County action, the Plaintiffs alleged solely that a referendum on the ordinance approving the site plan of Plaintiff Developers would be contrary to the Ohio constitution, which does not provide for a referendum of an administrative act. The Plaintiffs did not allege that Defendants were infringing their rights by not issuing the building permits, as at that time they were still involved in negotiations over some of the conditions the City supposedly required prior to the issuance of those permits. Nor did the Plaintiffs in the state court action aliege any discriminatory motive behind or impact that would result from the referendum. They could not have done so as that was not knowledge possessed by the Plaintiffs at that time.

(Docket No.50, p. 9) (footnote omitted). The last sentence of the quote as set forth above is fleshed out further in Plaintiffs' Brief at pages seven and eight. Plaintiffs claim that "[a]t the time of the filing of the Summit County Common Pleas action, Plaintiffs did not know that the City had made a decision that it would not proceed to continue processing the building permits for the project." (Docket No.50, p. 7). Plaintiffs also claim that they did not "have knowledge of the extent of the Mayor's involvement in the campaign to attain

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transactions. This case, in contrast, involves just one transaction, *i.e.*, the common nucleus of operative facts surrounding the issuance of building permits for the Pleasant Meadow apartment complex.

a referendum or of his decision to order that no building permits be issued, a decision that may have predated the filing of the referendum petitions. There is also evidence that other City officials, such as Councilman Potts, actively campaigned to stop the project. It is these actions that form the factual basis for the claims in this suit. " (Docket No.50, p. 8) (footnote omitted).

Thus, Plaintiffs argue that the second case does not involve the same transaction because: (1) the prior action did not involve the violations of their rights as a result of Defendants' denial of the building permit; and (2) they were not aware of certain events as of May 1, 1996. The two primary claims are addressed below.

1.

The claim that Plaintiffs "did not allege that Defendants were infringing their rights by not issuing building permits," in the state action is contradicted both by the relief sought in the state complaint and the evidence in the record before this court.

Paragraph five in the claim for relief in of the state complaint explicitly refers to the building permits:

> [t]hat the Court declare that if the Defendant, City Council, acted in its administrative capacity in adopting and passing Ordinance 48-1996 on 1 April 1996, *that then the Plaintiffs are able to proceed and should not be hindered in obtaining the necessary building permit(s) in an effort to promptly commence in the construction of Plaintiffs' 72 unit apartment complex*; and

(Docket No.33, Exhibit C) (emphasis added).

Plaintiffs also claim that "in the state court action [they did not] allege any discriminatory motive behind or impact that would result from the referendum." The allegation of motive is relevant to the substantive legal theories which were relied upon in the state action, and those which are relied upon in the present action. Under Ohio law, however, "[t]hat a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims." *Grava*, 73 Ohio St. 3d at 382 (quoting Comment c to Section 24, 1 Restatement of Judgments 2d (1982" (internal quotations omitted).

Moreover, "[t]he doctrine of *res judicata* requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it." *Grava*, 73 Ohio St. at 382 (quoting *National Amusements*, 53 Ohio St. 3d 60, 62 (1990))(internal quotations omitted). More importantly, there is evidence in the record that Mr. Boone was aware of his rights under federal law well in advance of filing the state action and felt that those rights had been violated prior to the filing of that action. In particular, Mr. Boone admitted that he raised the Fair Housing Act at the March 18, 1996 meeting. (Tr. at p. 60).

> Q: Isn't it true that the reason you raised that act. is because you wanted City Council to approve your project?
>
> A: Yes, I — based upon what I heard at the prior meetings, I felt that the reason if we were going to be denied was based upon hate and prejudice and discrimination and I wanted to basically let city council know that I wasn't going to tolerate it.

Q: Do you believe that the referendum petition that was filed on April 29th, 1996 was a result of hate and prejudice?

A: Yes.

(Tr. at p. 60-61). In his deposition, Mr. Boone suggested that he did not understand that the Fair Housing Act was a federal law. (Boone Dep. at pp. 12-13). This after-the-fact statement is undermined by the extent of his statement at the March 18, 1996 meeting. (See Hearing Exhibit 24, pp. 2-3). Mr. Boone stated:

> [t]he fair housing act 42-UA-3601 states that it is a violation of the federal fair housing act for any person including a municipality, to make unavailable or deny a dwelling to any person because of race, color, religion, sex, familial status, or national origin. In addition to that Ohio Revised Code Section 4112:02(H)(1) states that it is unlawful and a discriminatory practice for any person to deny or make unavailable housing because of race, color, religion, sex, ancestry, handicapped, national origin or familial status.
>
> In summary, we feel we have the legal right to proceed, and we are at this time requesting to council to not delay our efforts any longer. We understand the tremendous pressure the community has brought to bear upon you as elected officials. However, please remember the voters that placed you in this position of trust, places you in that position to do what is legally right for the community, not what happens to be popular. Thank you very much.

(Hearing Exhibit 24, p. 3). Furthermore, Mr. Boone testified at the hearing before Judge Bell that Mr. Kramer, *i.e.*, Mr. Boone's counsel in the state action and this action, attended the March 18, 1996 meeting. (Tr. at p. 40).

Because Mr. Boone, and the entities he controls, chose initially to pursue relief in state court, they should have alleged *all* of their claims, including their federal claims, in that forum.[14] Instead, Plaintiffs decided to take "the simplest, quickest route available to them." (Docket No.50, p. 9). Plaintiffs chose their forum and this court should defer to the

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[14] Alternatively, the plaintiffs could have filed suit in federal court initially. For example, in *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984), the United States Supreme Court stated:

> In the present litigation, petitioner does not claim that the state court would not have adjudicated her federal claims had she presented them in her original suit in state court. Alternatively, petitioner could have obtained a federal forum for her federal claim by litigating it first in a federal court.

465 U.S. at 84-85 (footnote omitted). The Supreme Court further stated:

> In the event that a 1983 plaintiffs federal and state-law claims are sufficiently intertwined that the federal court abstains from passing on the federal claims without first allowing the state court to address the state-law issues, the plaintiff can preserve his right to a federal forum for his federal claims by informing the state court of his intention to return to federal court on his federal claims following litigation of his state claims in state court. See, *e.g.*, *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964).

465 U.S. at 85 n.7 (italics in original).

finality of the Ohio judgment. *Migra v. Warren City School District Board of Education*, 465 U.5. 75 (1984).

2.

Plaintiffs also claim that they were not aware of certain events at the time of the May 1, 1996 state complaint. As noted above, they claim, for example, that they did not know that the City would not proceed to continue processing the building permit. This claim is not supported by the record.

Mr. Boone testified that he understood that the building of the fence was a condition which had to be met before the building permit for the apartment complex would issue. (Tr. at pp. 90-91). After City Council approved the site plan, Plaintiffs applied for the permit within days. (Tr. at p. 44). Mr. Boone testified, however, that work on the fence did not begin "because it became pretty obvious that we are in a fight, and I wasn't about to — first of all, we don't have the funds to put up a $70,000 fence. If we know we are going to receive with assurity the building permit to build the rest of the project, I — that's basically the reason. " (Tr. at p. 48). He also testified that he did not proceed with building the fence because "the rumors of a referendum were very prevalent." (Tr. at p. 92). He testified, "I felt the reasonable thing to do was to delay the construction of the fence until I was assured we were going to get a building permit." (Tr. at p. 92) (emphasis added).

The record before this court is clear. Mr. Boone was, according to his own testimony, aware that the issuance of the building permit for the complex was, at best, in jeopardy, and at worst, a foregone conclusion. His actions speak the loudest — he decided not to build the fence until he was "assured" that he was going to get the building permit. Paragraph five

of the prayer for relief in the state action sought just that, *i.e.*, that plaintiffs "not be hindered in obtaining the necessary building permit(s) in an effort to promptly commence in the construction of Plaintiffs' 72 unit apartment complex[.]" (Docket No.33, Exhibit C).

Plaintiffs have pointed to no evidence in the record which would demonstrate a triable issue on this point. Instead, Plaintiffs argue that "as late as April 26, 1996 the Chief Building Officer for Cuyahoga Falls was communicating by letter with requests for necessary changes to Plaintiff Developers in order to issue, building permits. Plaintiffs were not officially notified that Defendants would not issue the building permits until receiving...the Dzurilla [June 26, 1996] letter." (Docket No.50, p. 7) (footnote omitted). The April 26, 1996 communication was identified as Hearing Exhibit 17. This written communication merely represents the City's response to the plans after review by the various departments. There is no indication in that communication about the issuance of the permit for the building. Even so, there is no testimony in the record which would support any claim by Mr. Boone that he relied on this communication and believed that the permit was forthcoming. Again, his own testimony supports the contrary conclusion.[15]

Plaintiffs also claim that they were not aware of actions taken by certain administrators at the time of the May 1, 1996 state action. Again, the record provides no support for this assertion. At his deposition, Mr. Boone was asked why he

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[15] Counsel's statement that Plaintiffs were not "officially notified" until June 26, 1996 suggests that there was "unofficial" notice.

made the reference to the Fair Housing Act on March 18, 1996 and he stated:

> A: Because I — I felt and still feel that the reason that we were having so much trouble is because of discrimination.
>
> Q: On whose part?
>
> A: On the City's part. On the people that live in the City. *And certain members of the Administration.*

(Boone Dep. at p. 16) (emphasis added).

Further, Plaintiffs fail to cite any evidence of when they learned of such actions giving rise to the claims against the City administrators. As set forth above, there are no new material facts alleged in the complaint which was filed some sixty-five days after the first complaint. One would assume that if such new facts were discovered after the May 1, 1996 complaint, such facts would be alleged in the second action.

Finally, Mr. Boone testified that he believed, as of March 18, 1996, that the referendum was "based on discrimination. I believe that the reason they're doing it is based upon hate and prejudice...." (Boone Dep. at pp. 19-20).

> Q: Has anything happened between March 18 and today, being September 30, [1996,] to cause you to change your belief?
>
> A: *Not really. I'd say it's just been confirmed more, to be honest.*

(Boone Dep. at p. 20) (emphasis added).

(c.)

In summary, the action filed in Summit County Common Pleas Court on May 1, 1996, and the federal action presently before this court involve the same "transaction" for purposes of Ohio law and *res judicata* analysis.

(ii) "identical parties"

As set forth above, " [t]or the claim-preclusive aspect of *res judicata* to apply, the parties in a subsequent action must be identical to or in privity with the parties in the first action." *Deaton v. Burney*, 107 Ohio App. 3d 407, 411 (1995) (emphasis added) (italics in original).

The state complaint, as noted above, names as plaintiffs:

(1) Buckeye Community Hope Foundation;
(2) Cuyahoga Housing Partners, Inc.; and
(3) Buckeye Community Three L.P.

(Docket No.33, Exhibit C). The federal complaint names as plaintiffs:

(1) Buckeye Community Hope Foundation;
(2) Cuyahoga Housing Partners, Inc.;
(3) Buckeye Community Three L.P.;
(4) Fair Housing Contact Service.

(Docket No.1). Thus, on the plaintiff side, the "identical parties" in the state and federal suits are:

(1) Buckeye Community Hope Foundation;
(2) Cuyahoga Housing Partners, Inc.; and
(3) Buckeye Community Three L.P.

The state complaint named as defendants:

(1) City of Cuyahoga Falls;
(2) Cuyahoga Falls City Council;
(3) Gregg Wagner, Clerk of City Council, City of Cuyahoga Falls; and
(4) Summit County Board of Elections.

The federal complaint names as defendants:

(1) City of Cuyahoga Falls;
(2) Don Robart, in his individual and official capacity as Mayor, City of Cuyahoga Falls;
(3) Gregg Wagner, in his official capacity as Clerk of City Council, City of Cuyahoga Falls;
(4) Summit County Board of Elections; and
(5) Gerald M. Dzurilla, in his official capacity as Chief City Engineer.

On the defendant side, the "identical parties" are:

(1) the City of Cuyahoga Falls;
(2) Gregg Wagner, in his official capacity as Clerk of City Council; and
(3) the Summit County Board of Elections.

Therefore, the claims of Buckeye Community Foundation, Cuyahoga Partners, and Buckeye Three Limited, the state plaintiffs, against the City of Cuyahoga Falls, Gregg Wagner, in his official capacity as Clerk of City Council, and the Summit County Board of Elections, are, as a matter of law, are barred on grounds of *res judicata*. *Grava v. Parkman Township*, 73 Ohio St. 3d 379 (1995); *Deaton v. Burney*, 107 Ohio App. 3d 407 (1995).

(iii) "privity"

As set forth above, the "identical parties" to this suit should be dismissed on grounds of *res judicata* in light of the suit filed in Summit County Common Pleas Court. The next step in the inquiry is to determine which of the remaining parties are "in privity" to the identical parties. Those in privity should also be dismissed on grounds of *res judicata*. The remaining parties on the defendant side are: (1) Don Robart, in his official capacity as Mayor of Cuyahoga Falls, (2) Don Robart, in his individual capacity, and (3) Gerald Dzurilla, in his official capacity as Chief City Engineer. On the plaintiff side, the remaining party is Fair Housing Contact Service.

Under Ohio law, privity does not require a strict identity of parties:

> Although the doctrine of *res judicata* generally requires an identity of parties, strict identity is not always required. The doctrine has been applied when the party in the subsequent action, though not named as a party in the prior action, was a real party in interest in that prior action. In applying the doctrine, the court will look beyond the nominal parties to the substance of the cause to determine the real party in interest. Identity of parties is not a mere matter of form, but of substance.

Deaton v. Burney, 107 Ohio App. 3d 407, 412 (1995) (citations omitted). In *Kentucky v. Graham*, 473 U.S. 159 (1985), the United States Supreme Court stated:

> Personal-capacity suits seek to impose personal liability upon a government official for actions he

> takes under color of state law. Official-capacity suits, in contrast, generally represent only another way of pleading an action against an entity of which an officer is an agent. As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity It is not a suit against the official personally, for the real party in interest is the entity.

473 U.S. at 165-66 (italics in original) (citations omitted). The undersigned therefore concludes that Mr. Robart, in his official capacity as Mayor of Cuyahoga Falls, and Gerald Dzurilla, in his official capacity as Chief City Engineer, are in privity with the City of Cuyahoga Falls and should be dismissed from this action.

With regard to Mr. Robart individually, the weight of authority appears to support the proposition that a government official sued in his individual capacity is not in privity with the government entity for purposes of *res judicata*. See, *e.g.*, *Conner v. Reinhard*, 847 F.2d 384, 395 (7th Cir.), *cert. denied*, 488 U.S. 856 (1988) ("courts do not generally consider an official sued in his personal capacity as being in privity with the government."). At least one district court has stated, however, that, "[a]lthough an official sued in his individual capacity is generally not considered to be in privity with the government, and consequently not bound by a prior adjudication in which the government was a party,...a party cannot escape the rule of *res judicata through expansive pleadings*." *Cohen v. Shea*, 788 F. Supp. 66, 68 (D.Mass. 1992) (italics in original) (citations omitted) (emphasis added). Giving Plaintiffs the benefit of the doubt on this point, the undersigned concludes that Mr. Robart, in his individual

capacity, is not in privity with the City of Cuyahoga Falls. As set forth below, however, summary judgment in his favor is appropriate because Plaintiffs have failed to show that he acted in his individual capacity at any time in connection with the events giving rise to this lawsuit.

Defendants also assert that Fair Housing Contact Service is in privity with Plaintiff Developers, but cite no legal authority to support this specific proposition. (Docket No.51, p. 9). The undersigned concludes that Fair Housing Contact Service is not in privity with Plaintiff Developers for *res judicata* purposes. As set forth in Section C below, however, Fair Housing Contact Service lacks standing and should be dismissed.

B. Mr. Robart, individually.

The claims against Mayor Robart in his official capacity have been discussed above, and for the reasons stated, the claims are barred. The claims asserted against him in his individual capacity must now be addressed. While Plaintiffs have asserted several causes of action against Mr. Robart in his individual capacity, the critical initial inquiry is, however, whether the record reflects any actions by him in his individual capacity. A review of the record reflects that there is no evidence that Mr. Robart acted in any other capacity than as Mayor of Cuyahoga Falls. On this basis alone, Defendant Robart is entitled to summary judgment.

* * *

At his deposition, Mr. Boone testified that he "believes" that Mayor Robart was the person who facilitated the entire referendum process. (Boone Dep. at pp. 33-34). Yet, Mr. Boone admitted that he is not aware of any statements made

by any persons that would lead him to believe that Mayor Robart was the "force" behind the referendum. (Boone Dep. at p. 35). Mr. Boone testified that Mayor Robart did not tell him that he started referendum process. (Boone Dep. at p. 91). According to Mr. Boone, no one told Mr. Boone that Mayor Robart started the referendum process. (*Id.*) Mr. Boone also stated that he was not aware of any documents which reflect that Mayor Robart started the referendum process. (Boone Dep. at pp. 91-92). Further, Mr. Boone answered, "[n]o one" to the question: "Who told you or gave you information that led you to believe that Mayor Robart, either in his official capacity as Mayor or in his individual capacity as a citizen, started or initiated the [r]eferendum process: (Boone Dep. at pp. 93-94; *see also* pp. 94-95).

Mr. Boone's testimony at the preliminary injunction hearing before Judge Bell was similar. The most telling comment by Mr. Boone was as follows:

> Q . . . . Did [Mayor Robart] ever tell you he was opposing this project because children were involved?
>
> A. Specifically, he just said he was opposing the project because of the outcry of the constituents. So my opinion is that if he's opposing it because of their opposing it because of children or African Americans, then he is too.
>
> Q. Guilt by association?
>
> A. Yeah, more or less. (Tr. at pp. 106).

* * *

Plaintiffs argue that Mayor Robart's motivation for "lending support" for the referendum was exposed by his statements made at council meetings. (*See* Docket No.49, p. 4) In support, Plaintiffs argue that Mr. Robart did "not deny stating that Plaintiffs' project should be opposed 'with vigor,' in front of a number of the residents who led the petition drive to put the referendum on the ballot." (Docket No.49, p. 3) (footnote omitted). This statement, however, was made to the community as a whole at the March 18, 1996, meeting and not a special meeting of the citizen group promoting the referendum as Plaintiffs' brief suggests. Indeed, Plaintiffs point to Mayor Robart's statement at the March 18, 1996, as an important piece of evidence demonstrating the Mayor's discriminatory motive. (Docket No. 49, pp. 3-5). In particular, Plaintiffs claim that his statement on March 18, 1996 reflects that "Mayor Robart anticipated the possibility of lawsuit as a result of his actions." (Docket No. 49, p. 5).

Mayor Robart's statement at the March 18, 1996 statement is set forth in Hearing Exhibit 24 at pages 12 through 14. A review of the statement and Mayor Robart's corresponding hearing and deposition testimony reveals that Mayor Robart did take a strong position in opposition to the development. In fact, his position was that City Council reject the site plan. It is also clear that when Mayor Robart discussed the possibility of legal action he was discussing it in the context of what might happen if City Council rejected the site plan. Mayor Robart stated: "We are saying, well if we oppose this, if we vote it down, which I recommend all council do, then Mr. Boone is going to sue." (Hearing Exhibit 24, p. 13). It is clear that Mayor Robart was not anticipating a lawsuit for his own personal conduct. Later in the same statement, Mayor Robart concedes that if the proposal was

voted down and Mr. Boone sues, he will win. Apparently, Mayor Robart recognized what has been conceded in this case, that there was no legal justification for rejecting the site plan. Council recognized as much when it rejected Mayor Robart's suggestion to vote down the plan and passed the ordinance at its next meeting.

Plaintiffs also point to the fact that Mayor Robart called Mr. Barno after the decision by Judge Murphy to "gloat." (Docket No.49, pp. 6-7). Mr. Barno testified at the November, 1996 hearing that Mayor Robart called him after Judge Murphy's decision and asked if Mr. Barno had heard about the Judge's decision. According to Mr. Barno, Mayor Robart said "he wasn't calling to gloat but that he just thought we might like to know, ha, ha." (Tr. at p. 391). While the conduct is not what one would expect of a mayor, such a statement in the face of the evidence in the record is not enough to establish that Mayor Robart was acting in anything other than his official capacity.

* * *

In sum, Plaintiffs have failed to identify any evidence in the record which would create an issue as to whether Mr. Robart acted in any capacity other than his official capacity.

C. Fair Housing Contact Service — standing.

At this stage of the analysis, one Plaintiff remains: Fair Housing Contact Service. On this record, the undersigned concludes that Fair Housing Contact Service lacks standing.

Standing is a jurisdictional requirement and may be raised by a federal court *sua sponte*. "The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the

jurisdictional] doctrines.'" *FW/PBS. Inc. v. Dallas*, 493 U.S. 215, 231 (1990) (bracketed language in original) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984). The Sixth Circuit explained that: "Standing is determined by applying a three-part test: (1) has the plaintiff suffered a direct or imminent injury in fact? (2) is there a causal connection between the injury and defendant's conduct, or was the injury caused by 'the independent action of some third party not before the court?' and (3) is there a 'likelihood that the injury will be redressed by a favorable decision?'" *DeBolt v. Espy*, 47 F.3d 777, 779 (6th Cir. 1995) (citation omitted) (Fair Housing Act case). An organization may have independent standing to sue, apart from its members, but:

> [a] mere interest in a problem is not . . . sufficient to confer standing upon an organization. Instead, . . . the Coalition must establish "that its ability to further its goals has been 'perceptively impaired' so as to constitute[] far more than simply a setback to the organization's abstract social interests." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S.Ct. 1114, 1124, 71 L.Ed.2d 214 (1982).

Greater Cincinnati Coalition for the Homeless v. City of Cincinnati, 56 F.3d 710, 716-17 (6th Cir. 1995) (italics in original) (citation omitted). An organization may also have standing to sue in a representative capacity, provided it can show that "'(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Greater Cincinnati Coalition for the Homeless*, 56 F.3d at 717 (quoting *Hunt v. Washington State Apple Advertising*

Commission, 432 U.S. 333, 343 (1977".

(i) "evidence in the record"

On the record before the court, there is no evidence, beyond one conclusory allegation in the complaint, and a corresponding affidavit, of Fair Housing Contact Service's involvement in the proposed development, that would establish standing on the part of Fair Housing Contact Service. The little evidence in the record is as follows.

In Plaintiffs' complaint, there is only one specific reference to Fair Housing Contact Service. In paragraph eight of the complaint, which is included in the "Parties" section of the complaint, alleges:

> Plaintiff Fair Housing Contact Service is a not-for-profit, fair housing organization located in Akron, Ohio. Fair Housing Contact Service has had a contract with Summit County since 1974 to provide fair housing services, landlord-tenant counseling, housing research, and technical assistance. Fair Housing Contact Service is required to provide for fair housing activities throughout the county. Part of this agreement states that as a recipient of funding, Fair Housing Contact Service will "administer all programs and activities relating to housing and community development in a manner to affirmatively further fair housing within Constitutional limitations throughout the United States. " Some of its employees and members are potential tenants for the apartment complex to be built by the Developers at the Pleasant Meadow Blvd[.] property. The actions and conduct of the defendants are frustrating the fair housing purpose of the organization, its employees and members.

(Docket No. I at para. 8). The "Statement of Facts" section of the complaint makes no reference whatsoever to Fair Housing Contact Service. Instead, the facts involve Plaintiff Developers. Similarly, in the "Claims for Relief" section of the complaint, there is no allegation of an injury specific to Fair Housing Contact Service. Again, the claims refer to "Plaintiff Developer," "Plaintiff Foundation," or "Plaintiffs" collectively.

The record also contains an October 29, 1996 affidavit of Lynn M. Clark, Executive Director Fair Housing Contact Service. (Docket No.50, Exhibit L). In pertinent part, the affidavit states:

> FHCS has been damaged by the Defendants in case No. 5:96CV1458 because its mission has been thwarted and its resources expended to combat the discrimination in housing that FHCS believes occurred as described in the pleadings in that matter.
>
> FHCS employees and individual [*sic*] members who subscribe to our services will be harmed by the Defendants in case No. 5:96CV1458 because they are perspective [*sic*] eligible residents for this housing which would enable them to save monies and not be forced to expend excess funds on obtaining safe and decent housing. Preventing the development of this housing will cause FHCS employees and members permanent and irreversible harm by denying them an [*sic*] choice of affordable, safe and decent housing located in the neighborhood of their preference.

(Docket No.50, Exhibit L).

On Tuesday, November 19, 1996, at the injunction

hearing before Judge Bell, Plaintiffs presented the testimony of two persons who identified themselves as members of Fair Housing Contact Service, Sandra Montgomery and Crystal M. Williams. (Tr. at pp. 158-69). Ms. Montgomery testified that she had been a member of Fair Housing Contact Service for about four years. (Tr. at p. 159). In response to the question, "[i]f you could rent a two or three bedroom apartment in Cuyahoga Falls on Pleasant Meadow Boulevard and your child could attend the Woodridge schools at a below market rent, below fair market rent value, would you apply to rent at that apartment building?", Ms. Montgomery testified, "[y]es, I would." (Tr. at p. 159).

On cross-examination, however, Ms. Montgomery testified that she became a member of Fair Housing Contact Service simply by calling its office, that she did not have to pay any dues, and that she does not receive any newsletters. (Tr. at pp. 159-60). She described her contact with Fair Housing Contact Service since becoming a member as "not a lot." (Tr. at p. 160). Ms. Montgomery further testified that her first contact with anyone regarding the case was the previous Saturday, when she spoke with Lynn Clark and volunteered to testify. (Tr. at pp. 162-63).

Crystal Williams also testified that she would apply to rent a two or three bedroom apartment, at below market rent, on Pleasant Meadow Boulevard in Cuyahoga Falls. (Tr. at p. 166). Ms. Williams, a student at the University of Akron, testified that if she had a subsidized apartment, she would probably attend graduate school. (Tr. at 166-67).

(ii) "standing analysis"

It is apparent that Fair Housing Contact Service has patterned its allegation of injury upon the plaintiff organization's allegation of relief in *Havens RealtY Co. v. Coleman*, 455 U.S. 363 (1982). In paragraph eight of the complaint, Fair Housing Contact Service alleges that "[t]he actions and conduct of the defendants are frustrating the fair housing [purpose] of the organization, its employees and members." Ms. Clark's affidavit further indicates that FHCS has been damaged by the Defendants in case No.5:96CV1458 because its mission has been thwarted and its resources expended to combat the discrimination in housing that FHCS believes occurred as described in the pleadings in that matter. " In *Havens Realty*, the plaintiff organization Housing Opportunities Made Equal ("HOME") alleged that:

> "Plaintiff HOME has been *frustrated* by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff HOME has had to *devote significant resources* to identify and counteract the defendant's [*sic*] racially discriminatory steering practices."

455 U.S. at 79 (quotation marks and "sic" in original) (emphasis added). Invoking the *Havens Realty* language, however, does not by itself guarantee a finding of standing.

In *Williams v Adams*, 625 F. Supp. 256 (N.D. Ill. 1985), the plaintiff, Hope Fair Housing Center, evidently modeled its allegation of injury on *Havens Realty*. The district court granted the defendants' motion to dismiss. Hope alleged in the complaint that the defendants' conduct conflicted with the organization's goals. 625 F. Supp. at 259. The district court

rejected this argument:

> With respect to claims of standing in its own behalf, it is not enough that an organization allege that a particular defendant's conduct is against the policies or goals of that organization. It is precisely this type of broad organizational interest which the Supreme Court rejected in *Sierra Club v. Morton*, 405 U.S. 727, 739-40, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972), since it is too abstract to represent a meaningful basis for standing. If this type of interest were all that is necessary to establish standing, Hope would have standing in every individual case of alleged housing discrimination in DuPage County, or perhaps in an even broader geographical area.

625 F. Supp. at 260 (italics in original). The district court characterized the central issue in the following manner: "[t]he problem here is that nowhere in the complaint has Hope articulated how it or any of its members have been banned by the defendants ' actions. " 625 F. Supp. at 261; also *Greater Cincinnati Coalition for the Homeless*, 56 F.3d at 717 (affirming district court's dismissal of complaint and noting district court's statement that "'[t]he Coalition has not demonstrated any distinct and palpable increase in its expenditures as a result of the Ordinance.'").

In this case, the basic issue is the same. In paragraph eight of the complaint, Fair Housing Contact Service makes a generalized allegation of harm based on frustration of purpose. As noted above, any mention of Fair Housing Contact Service, independent of the other Plaintiffs, is conspicuously absent from the remainder of the complaint. Since filing the complaint, Fair Housing Contact Service has

submitted the affidavit of Ms. Clark and, as set forth above, presented the testimony of two witnesses at the injunction hearing. This additional "evidence," however, does not add in any meaningful way to Fair Housing Contact Service's conclusory allegation in the complaint that it and its members have been harmed. In the summary judgment context, Fair Housing Contact Service is required to come forward with "specific facts" to support its allegations with regard to standing. *See* Fed. R. Civ. P. 56(e). Fair Housing Contact Service has failed to meet this requirement. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990) ("Rule 56(e) provides that judgment 'shall be entered' against the nonmoving party unless affidavits or other evidence 'set forth specific facts showing that there is a genuine issue for trial.' *The object of this provision is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.*") (emphasis added).

As a final point, Fair Housing Contact Service's claim that it has expended additional resources as a result of Defendants' actions is undercut by Mr. Boone's testimony at his deposition that Fair Housing Contact Service is not paying its own legal fees in the present litigation. (Boone Dep. at p. 57). Further, while a court is under no obligation to "comb" the record in an effort to find evidence which demonstrates a factual dispute, the undersigned has reviewed this record and notes the complete absence of Fair Housing Contact Service at every juncture, except for the present litigation. Mr. Boone's testimony regarding how he learned that Fair Housing Contact Service was to be a plaintiff is revealing; the record strongly suggests he was told by his lawyer that the organization would be a plaintiff. (Boone Dep. at pp. 52-54).

Fair Housing Contact Service points to no specific facts in

the record, and none are apparent upon the undersigned's independent review of the record, to support its conclusory allegations with regard to standing. For the reasons set forth above, Fair Housing Contact Service should be dismissed from the case because it lacks standing.

IV. Conclusion.

For the reasons set forth above, the Defendants' motions for summary judgment (Docket Nos. 32 and 34) should be granted and this case should be dismissed in its entirety.[16]

As a final matter, it is important to note that the recommended decision embodied here does not represent any judgment on the Defendants' actions on the merits or the referendum. The record clearly conveys the emotional nature of the issues raised by the proposed development. The undersigned, however, has evaluated the legal issues presented in this case detached from the emotion reflected in the record.

Plaintiffs controlled their own destiny when they chose the time and forum for the first action. They were sophisticated in these matters, fully aware of their rights, and had the benefit of legal counsel. They simply chose, in Plaintiffs' own words, to take "the simplest, quickest route available[.]"

The parties to this action may object to and seek review of this Report and Recommendation within ten (10) days of

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[16] Defendant Summit County Board of Elections has not specifically moved for summary judgment. Nonetheless, judgment should be entered in its favor and against the Plaintiffs for the reasons applicable to the City Defendants.

service of a copy hereof as provided in 28 U. S.C. 636(b)(1) and Local Rule 5:3.1(b)[17] Failure to file objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

Pursuant to Local Rule 5:3.1(b), objections, if any, to this Report and Recommendation shall be filed with the Clerk of Court and served on the United States Magistrate Judge and all parties. Any response to such objections shall be filed and served in a similar manner.

SIGNED and ENTERED on this 14th day of February, 1997.

s/ James D. Thomas
United States Magistrate Judge

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[17] The undersigned's courtroom deputy has arranged for personal service of this report and recommendation to be completed on February 14, 1997. Given the background of this case, the undersigned suggests that any objections should be filed forthwith.

Appendix

state complaint	federal complaint
6 That the foundation caused the formation of said BCTLP and Cuyahoga entities controlled by it, specifically for the development of the premises noted *infra*, and following the usual practice necessary for the eventual funding of the development utilizing "tax credits" and "grants" from The Ohio Department of Development for a HOME Loan, Summit County, Ohio for a HOME Loan, and the Summit County Housing Trust Fund.	12 Plaintiff Foundation caused the formation of Plaintiffs BCTLP and Cuyahoga ... specifically for the development of the property located at the south side of Pleasant Meadow Blvd., Cuyahoga Falls. The Developer followed the usual practice necessary for the eventual funding of a development using "tax credits" and "grants" by applying with the Ohio Department of Development for a HOME Loan, Summit County, Ohio for a HOME Loan, and the Summit County Housing Trust Fund.
12 That the real property noted in Exhibit "B" was zoned R-17 Medium Density Multiple Family, prior to the aforementioned purchase date, and continues to be zoned R-17, and during the period of purchase to present	14 The Pleasant Meadow Blvd was zoned R-17 Medium Density Multiple Family, prior to the purchase date, and continues to be zoned R-17, and during the period of purchase to present is not

is not known to be the subject of any proposed change of zoning[.]	known to be the subject of any proposed change of zoning.
13 That prior to 21 February 1996, the Foundation, submitted a proper and complete site plan proposal for a 72 unit apartment complex for the aforementioned real property to the Planning Commission for the City, known as Planning Commission File P-6-96-SP.	15 Prior to February 21, 1996, Plaintiff Foundation submitted a proper and complete site plan proposal for a 72-unit apartment complex for the property to the Planning Commission for the City, known as Planning Commission File P-6-96-SP, which plan met or exceeded all construction and developmental ordinances, regulations, laws and codes for the land in question.
14 That the Foundation did not request the Planning Commission for any zoning amendments, variances, or any other change of the current and proper R-17 Medium Density Multiple Family zoning of the premises, which meet and exceeded all construction and developmental ordinances and regulations[.]	16 Plaintiff Foundation did not request from the Planning Commission any zoning amendments, variances, or any other change of the current and proper R-17 Medium Density Multiple Family zoning of the premises.
15 That on or about 21	17 On or about February

February 1996, the Planning Commission unanimously approved Plaintiff, Foundations, site plan proposal, without condition (excepting those accepted by Plaintiff, Foundation)[.]	21, 1996, the Planning Commission unanimously approved Plaintiff Foundation's site plan proposal.
16 That on or about 1 April 1996, the aforementioned site plan proposal was submitted to Defendant, City Council, for approval, per the City's charter, Article VIII, Section 1.7[.]	18 Prior to April 1, 1996, the site plan proposal was submitted to Defendant City Council for approval according to the City's Charter, Article VIII, Section 1.7.
17 That the Defendant, City Council, approved the Planning Commission's recommendation in Ordinance #48-1996, by a vote of six to three and two abstentions, acting in its administrative capacity. No zoning amendments, variances, or other charges [sic] were made to the site plan proposal adopted by the Planning Commission ...	19 On April 1, 1996, Defendant City Council, acting in its administrative capacity, approved the Planning Commission's recommendation in Ordinance #48-1996, by a vote of six to three and two abstentions. 20 No zoning amendments, variances, or other changes were made by Ordinance #48-1996 to the site plan proposal adopted by the Planning Commission.

18 That the Mayor of the City of Cuyahoga Falls did not sign nor return to Defendant, City Council, Ordinance 48-1996, pursuant to Article 2, Section 5 of the City's charter; whereby said Ordinance went into full force and effect ten days from the date Defendant, City Council's, passage of said Ordinance on 1 April 1996, having an effective date of 11 April 1996[.]	23 The Mayor of the City of Cuyahoga Falls did not sign nor return to Defendant, City Council, Ordinance #48-1996; whereby, pursuant to Article 2, Section 5 of the City's charter; the Ordinance went into full force and effect on April 11, 1996, ten days from the date of Defendant City Council's passage of this Ordinance.
19 That on or about 29 April 1996, certain purported electors of the City of Cuyahoga Falls submitted to Defendant, Gregg Wagner, in his capacity as the Clerk of City Council, a referendum petition in an effort to overturn the aforementioned Ordinance 48-1996.	24 On or about April 29, 1996, certain purported electors of the City of Cuyahoga Falls, who had opposed the Developers' site plan before the Planning Commission and City Council because the project would be targeted for families with children and because they feared the apartment complex would attract minorities, submitted to Defendant Gregg Wager, in his capacity as the Clerk for City Council, a referendum petition in an effort to repeal Ordinance

#48-1996.

20 That on or about 30 April 1996, Defendant Gregg Wagner, after accepting said petition from certain purported electors, authorized said petition in his capacity as Clerk for City Council and has or will submit said petition to Defendant , Summit County Board of Elections, for verification and certification of the signatures affixed to said petition[.]

21That Defendant, Summit County Board of Elections, is now or will soon be in the process of verifying and certifying the signatures affixed to said petition[.]

22 That should Defendant, Summit County Board of Elections, be allowed to verify and certify the signatures affixed to said petition, Defendant, Summit County Board of Elections, would then submit said petition to Defendant, City

25 On or about April 30, 1996, Defendant Gregg Wagner, after accepting these petitions from certain purported electors, authorized in his capacity as Clerk for City Council the submission of the petition to Defendant Summit county Board of Elections for verification and certification of the signatures affixed to the petition.

26 Defendant Summit County Board of Elections verified and certified the signatures affixed to the petition to be sufficient to submit this issue for a vote of the electors of the City of Cuyahoga Falls in the November 1996 General Election.

27 On or about May 1, 1996, the Defendant, Summit County Board of Elections then returned the petitions to the Defendant

Council , pursuant to Defendant, City's, municipal charter Article IX[.]

Gregg Wagner for further action by City Council pursuant to Defendant City's municipal charter Article IX.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Filed December 4, 2001

Nos. 99-4555/00-3052

Buckeye Community Hope Foundation, et al.,)
Plaintiffs-Appellants/Cross-Appellees)
)
v.)
)
City Of Cuyahoga Falls, et al.,)
Defendants-Appellees/Cross-Appellants)

ORDER

BEFORE: JONES, DAUGHTREY, and COLE, Circuit Judges,

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green, Clerk

APPENDIX F

SUPREME COURT OF OHIO

No. 97-137

BUCKEYE COMMUNITY HOPE FOUNDATION et al.,
Appellants,

vs.

CITY OF CUYAHOGA FALLS et al.,
Appellees.

82 Ohio St.3d 539, 697 N.E.2d 181, 1998 Ohio LEXIS 2198
July 16, 1998, Decided

Original Opinion of May 6, 1998, Reported at: 1998 Ohio LEXIS 1204.

STATEMENT OF THE CASE

APPEAL from the Court of Appeals for Summit County, No. 17933.

ON MOTION FOR RECONSIDERATION

Appellant Buckeye Community Hope Foundation ("Buckeye Hope"), a nonprofit Ohio corporation, develops housing for individuals through the use of state grants and tax

credits. Buckeye Hope is affiliated with Cuyahoga Housing Partners, Inc. and Buckeye Community Three L.P. ("Buckeye Three"), also appellants herein.

In 1995, Buckeye Three purchased a tract of land in Cuyahoga Falls for the purpose of building a seventy-two unit apartment complex. The land was zoned for multifamily use. Subsequently, the Cuyahoga Falls Planning Commission unanimously approved a site plan concerning the proposed complex. Pursuant to Section 1.7, Article VIII of the Charter of Cuyahoga Falls, the plan was then submitted to the City Council of Cuyahoga Falls for its approval.

On April 1, 1996, the city council ratified the decision of the planning commission by passing Ordinance No. 48-1996. The ordinance provided, in part, that "City Council approves the plan for development of land situated in an R-17 Medium Density Multiple Family zoning district in accordance with such district and zoning regulations as stipulated in the Codified Ordinances of the City of Cuyahoga Falls and as approved by the Planning Commission * * * ."

Following passage of the ordinance, a group of residents of Cuyahoga Falls filed referendum petitions with the clerk of city council. The petitions sought a referendum to approve or reject Ordinance No. 48-1996, pursuant to Section 2, Article IX of the municipal charter, which provides, in relevant part, that the citizens of Cuyahoga Falls "have the power to approve or reject at the polls *any ordinance or resolution passed by the Council* * * * ." (Emphasis added.) The Summit County Board of Elections then certified that the petitions contained a sufficient number of valid signatures to be placed on the November 1996 ballot.

On May 1, 1996, the appellants filed a complaint against the appellees in the Court of Common Pleas of Summit County, requesting injunctive relief and a declaration that the ordinance could not be challenged by referendum because its passage by the city council was an administrative, rather than legislative, action. Appellants claimed that Section 1f, Article II of the Ohio Constitution did not grant powers of referendum to citizens of municipalities on administrative actions taken by municipal legislative bodies.

The trial court denied the appellants' request for injunctive relief. The court also determined that the Charter of Cuyahoga Falls permitted the residents of the city to exercise powers of referendum on any action taken by the city council, regardless of whether the action taken was legislative or administrative in nature.

Appellants appealed the decision of the trial court to the Court of Appeals for Summit County. The court of appeals affirmed the judgment of the trial court, holding that Section 1f, Article II of the Ohio Constitution does not limit the referendum powers of charter municipalities such as Cuyahoga Falls.

Pursuant to the allowance of a discretionary appeal, this court affirmed the judgment of the court of appeals. *Buckeye Community Hope Found. v. Cuyahoga Falls* (1998), 81 Ohio St.3d 559, 692 N.E.2d 997.

The cause is now before this court upon a motion for reconsideration filed by the appellants.

HEADNOTE

Municipal corporations -- Citizens of municipality may not

exercise powers of referendum greater than those powers granted by Section 1f, Article II of the Ohio Constitution -- Pursuant to Section 1f, Article II of the Ohio Constitution, actions taken by a municipal legislative body that constitute administrative action are not subject to referendum proceedings -- Passage by city council of an ordinance approving a site plan for the development of land constitutes administrative action and is not subject to referendum proceedings.

SYLLABUS

1. The citizens of a municipality may not exercise powers of referendum, by charter or other means, greater than those powers granted by Section 1f, Article II of the Ohio Constitution.

2. Pursuant to Section 1f, Article II of the Ohio Constitution, actions taken by a municipal legislative body, whether by ordinance, resolution, or other means, that constitute administrative action, are not subject to referendum proceedings.

3. The passage by a city council of an ordinance approving a site plan for the development of land, pursuant to existing zoning and other applicable regulations, constitutes administrative action and is not subject to referendum proceedings.

COUNSEL

Zeiger & Carpenter, John W. Zeiger, Jeffrey A. Lipps and Michael N. Beekhuizen; McFarland Law Office and J. Drew McFarland, for appellants.

JUDGES

MOYER, C.J. PFEIFER, COOK and LUNDBERG STRATTON, JJ., concur. LUNDBERG STRATTON, J., concurs separately. DOUGLAS, RESNICK and F.E. SWEENEY, JJ., dissent.

AUTHOR: MOYER

OPINION

{*541}

MOYER, C.J. This court has invoked the reconsideration procedures set forth in S. Ct.Prac.R. XI to "correct decisions which, upon reflection, are deemed to have been made in error." *State ex rel. Huebner v. W. Jefferson Village Council* (1995), 75 Ohio St.3d 381, 383, 662 N.E.2d 339, 341. For the reasons that follow, we grant the appellants' motion for reconsideration and reverse the judgment of the court of appeals.

I

Section 3, Article XVIII of the Ohio Constitution grants powers of local self-government to municipalities by providing, "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." In exercising those powers, municipalities may choose to govern themselves by charter in accordance with Section 7, Article XVIII of the Ohio Constitution: "Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."

It is well settled that although the Ohio Constitution grants broad powers of local self-government to municipalities, the scope of those powers is not without limits. In *Canton v. Whitman* (1975), 44 Ohio St.2d 62, 73 Ohio Op. 2d 285, 337 N.E.2d 766, this court interpreted Section 3, Article XVIII as follows: "This section, adopted in 1912, preserved the supremacy of the state in matters of 'police, sanitary and other similar regulations,' while granting municipalities sovereignty in matters of local self-government, *limited only by other constitutional provisions.*" (Emphasis added.) *Id.* at 65, 73 Ohio Op. 2d at 287, 337 N.E.2d at 769. See, also, *State ex rel. Bedford v. Cuyahoga Cty. Bd. of Elections* (1991), 62 Ohio St.3d 17, 20, 577 N.E.2d 645, 647.

In *Bazell v. Cincinnati* (1968), 13 Ohio St.2d 63, 42 Ohio Op. 2d 137, 233 N.E.2d 864, paragraph one of the syllabus, we articulated the limits of charter government by stating that "a charter city has all powers of local self-government *except to the {*542} extent that those powers are taken from it or limited by other provisions of the Constitution* or by statutory limitations on the powers of the municipality which the Constitution has authorized the General Assembly to impose." (Emphasis added.) More recently, we stated that "[a] municipality that chooses to adopt a charter does so in order to manage its own purely local affairs without interference from the state, *with the understanding that these local laws will not conflict with the Constitution and general laws.*" (Emphasis added.) *Rispo Realty & Dev. Co. v. Parma* (1990), 55 Ohio St.3d 101, 102, 564 N.E.2d 425, 426-427.

The City Charter of Cuyahoga Falls provides that voters may exercise powers of referendum on any ordinance or resolution passed by the city council. The appellants contend

that this provision conflicts with Section 1f, Article II of the Constitution, which provides, "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers may be exercised in the manner now or hereafter provided by law."

Words used in the Constitution are construed according to their usual or customary meaning. See *State ex rel. Herman v. Klopfleisch* (1995), 72 Ohio St.3d 581, 584, 651 N.E.2d 995, 998; R.C. 1.42. Section 1f, Article II reserves referendum powers to the people of "each municipality." Those words are unambiguous. There is no distinction between charter municipalities and municipalities that have no charter. Additionally, Section 1f, Article II is the sole constitutional source of initiative and referendum powers, reserved by the people of the state to the people of each municipality.

Section 1f, Article II provides initiative and referendum powers only on those questions that municipalities "may now or hereafter be authorized by law to control by legislative action." We have interpreted this phrase to exclude, from referendum proceedings, administrative actions taken by a city council.[1] In *Myers v. Schiering* (1971), 27 Ohio St.2d 11, 56 Ohio Op. 2d 6, 271 N.E.2d 864, we held that "under Section 1f of Article II of the Ohio Constitution, municipal referendum powers are limited to questions which

[1] As a municipal legislative body, city councils may act in an administrative capacity. *Donnelly v. Fairview Park* (1968), 13 Ohio St.2d 1, 42 Ohio Op. 2d 1, 233 N.E.2d 500, paragraph one of the syllabus.

municipalities are 'authorized by law to control by legislative action.'" *Myers* at paragraph one of the syllabus. There, we determined that the passage of a resolution "granting a permit for the operation of a sanitary landfill, pursuant to an existing zoning regulation, constitutes administrative action and is not subject to referendum proceedings." *Id.* at paragraph two of the syllabus. See, also, *State ex rel. Srovnal v. Linton* (1976), 46 Ohio St.2d 207, 75 Ohio Op. 2d 241, 346 N.E.2d 764.

{*543} The prior majority opinion in this case determined that both *Myers* and *Srovnal* were inapposite because neither case presented an issue regarding referendum powers granted by charter. That conclusion was not correct.

The prior majority opinion reasoned that because Section 1f, Article II is not a self-executing provision, charter municipalities enacting ancillary legislation to carry out the principles enunciated in Section 1f, Article II were not restricted to following the statutory initiative and referendum procedures enacted by the General Assembly for non-charter municipalities. *Buckeye Community Hope Found. v. City of Cuyahoga Falls*, 81 Ohio St.3d 559, 565-566, 692 N.E.2d 997, 1001-1002 (1998). The prior majority opinion then concluded that by virtue of Section 7, Article XVIII, charter municipalities were not limited by Section 1f, Article II to providing referendum powers only for actions legislative in nature. *Buckeye*, 81 Ohio St.3d at 566, 692 N.E.2d at 1002.

It is true that charter municipalities, in providing for referendum and initiative powers, are not restricted to the statutory mechanisms for initiative and referendum proceedings that govern non-charter municipalities. Charter provisions may be more restrictive, or less restrictive than those statutory procedures pursuant to the power of local self-

government granted by the people under Sections 3 and 7 of Article XVIII, as the prior majority opinion noted. *Buckeye*, 81 Ohio St.3d at 565-566, 692 N.E.2d at 1001-1002. However, both the statutory procedures enacted by the General Assembly to carry into effect Section 1f, Article II, and provisions enacted by charter municipalities to do the same, must be consistent with the specific powers granted by Section 1f, Article II, since it is the sole constitutional source for referendum and initiative powers. Otherwise, the meaning of any constitutional provision that is not self-executing, and therefore requires ancillary legislation, could be altered by the words of the legislation carrying the provision into effect.

Accordingly, there is no persuasive reason to deviate from our well-established case law as stated in *Myers* and *Srovnal*. Section 1f, Article II clearly limits referendum and initiative powers to questions that are legislative in nature. Charter municipalities are subject to this limitation, as the powers of local self-government granted pursuant to Sections 3 and 7 of Article XVIII are subject to the limitations of other provisions of the Constitution. See *Bazell*, at paragraph one of the syllabus, and *Whitman*, 44 Ohio St.2d at 65, 73 Ohio Op. 2d at 287, 337 N.E.2d at 769.

The section of the Charter of Cuyahoga Falls providing that voters may exercise powers of referendum on any ordinance or resolution passed by the city council is constitutionally invalid. Voters of Cuyahoga Falls may exercise powers of referendum on any ordinance or resolution that constitutes legislative action. Section 1f, Article II does not authorize the residents of Cuyahoga Falls to initiate referendum proceedings on an action taken by the city council that is not {*544} legislative in nature. Section 1f, Article II

permits initiative and referendum powers only on those matters that constitute legislative action.

Therefore, we hold that the citizens of a municipality may not exercise powers of referendum, by charter or other means, greater than those powers granted by Section 1f, Article II of the Ohio Constitution.

II

The remaining question for our determination is whether the approval of the site plan by the city council constituted administrative or legislative action.

The city argued that the approval of the site plan was a legislative action because the action was taken by adopting an ordinance. In support of its position, the city cited *Donnelly v. Fairview Park* (1968), 13 Ohio St.2d 1, 42 Ohio Op. 2d 1, 233 N.E.2d 500, paragraph two of the syllabus, which states that "the test for determining whether the action of a legislative body is legislative or administrative is whether the action taken is one enacting a law, ordinance or regulation, or executing or administering a law, ordinance or regulation already in existence."

The question presented to this court in *Donnelly* was whether the action of a city council in failing to approve the recommendation of the city's planning commission for a resubdivision of a parcel of real estate constituted legislative or administrative action. *Id.* at 3, 42 Ohio Op. 2d at 2, 233 N.E.2d at 501. This court determined that the action was administrative. Id. at 4, 42 Ohio Op. 2d at 3, 233 N.E.2d at 502. In arriving at that conclusion, the court stated, " 'The crucial test for determining that which is legislative from that which is administrative or executive is whether the action

taken was one already making a law, or executing or administering a law already in existence.' * * * If, then, the action of a legislative body *creates a law, that action is legislative, but if the action of that body consists of executing an existing law, the action is administrative.*" (Emphasis added.) *Id.* at 4, 42 Ohio Op. 2d at 2-3, 233 N.E.2d at 502, citing *Kelley v. John* (1956), 162 Neb. 319, 321, 75 N.W.2d 713, 715. Therefore, paragraph two of the syllabus in *Donnelly* established that the test requires an examination of the nature of the action taken, rather than the mere form in which it is taken.[2] Accordingly, the city's position that the approval of the site plan was a legislative action because the council took action via an ordinance (rather than by resolution or other means) is in error.

Additionally, the city argued that the ordinance approving the site plan constituted legislative action because city law stated that decisions made by the {*545} city council relating to approvals of site plans "shall be considered as legislative rather than administrative actions." Cuyahoga Falls Zoning Ordinance No. 1171.03(c). This argument also is without merit. The city council cannot designate an action as legislative simply because it desires the action to be legislative. *Donnelly* requires that the nature of the action taken determines whether it is legislative or administrative, *i.e.*, whether the action creates or establishes law, or whether the action merely applies existing law to a given situation. *Donnelly* at 4, 42 Ohio Op. 2d at 2, 233 N.E.2d at 502. Additionally, it is our constitutional duty, in interpreting the

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[2] The quoted language in the text of *Donnelly* is instructive in determining the meaning of paragraph two of the syllabus because paragraph two itself is not stated within the text.

words of Section 1f, Article II, to independently analyze whether the action by the city is a legislative action.

The action taken by the city council here was clearly administrative in nature. Ordinance No. 48-1996 passed by the city council approved a plan for the "development of land * * * in accordance with such district and zoning regulations as stipulated in the Codified Ordinances of the City of Cuyahoga Falls and as approved by the Planning Commission * * * ." The ordinance merely approves the planning commission's application of existing zoning regulations to the plan submitted by the appellants. The ordinance has no general, prospective application such that the action taken would fit within the usual and customary meaning of the phrase "legislative action" contained in Section 1f, Article II. See Black's Law Dictionary (6 Ed.1990) 899 (defining "legislative act" as "law * * * passed by legislature in contrast to court-made law. One which prescribes what the law shall be in future cases arising under its provisions."). Rather, the city council determined the rights of the appellants by applying existing law to the site plan submitted by the appellants. Accordingly, adoption of Ordinance No. 48-1996 was an administrative act, and therefore was not a legislative action that could be subjected to referendum proceedings pursuant to Section 1f, Article II.

Therefore, we hold that pursuant to Section 1f, Article II of the Ohio Constitution, actions taken by a municipal legislative body, whether by ordinance, resolution, or other means, that constitute administrative action, are not subject to referendum proceedings. The passage by a city council of an ordinance approving a site plan for the development of land, pursuant to existing zoning and other applicable regulations,

constitutes administrative action and is not subject to referendum proceedings.

Pursuant to S. Ct. Prac. R. XI, the timely filing of a motion for reconsideration temporarily prevents the issuance of a mandate in accordance with the court's judgment. A timely motion was filed in this cause. Thus, this court has not yet issued a mandate in this action to implement our opinion rendered on May 6, 1998, and reported at 81 Ohio St.3d 559, 692 N.E.2d 997. Under S. Ct.Prac.R. XI(3)(A)(2), where a timely filed motion for reconsideration is granted, a mandate shall issue at the time the Supreme Court's judgment entry on reconsideration is {*546} entered. In accordance with our grant of the motion for reconsideration today, a mandate implementing this opinion shall also issue today.

For the foregoing reasons, we grant the motion for reconsideration and reverse the judgment of the court of appeals.[3]

Reconsideration granted and judgment reversed.

PFEIFER, COOK and LUNDBERG STRATTON, JJ., concur.
LUNDBERG STRATTON, J., concurs separately.
DOUGLAS, RESNICK and F.E. SWEENEY, JJ., dissent.

DISPOSITION

Reconsideration granted and judgment reversed.

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[3] Our earlier opinion, including paragraphs one and two of the syllabus, as reported at 81 Ohio St.3d 559, 692 N.E.2d 997, is hereby nullified in all respects by virtue of our decision today, and thus has no controlling authority.

CONCURRENCE

LUNDBERG STRATTON, J., concurring. As the justice who changed her vote on an opinion that has already been published, I feel obliged to explain my decision to reconsider and to join the former dissenters in issuing a new majority opinion.

As a trial judge, issues before me were frequently clear, easy to resolve, and more black and white (though certainly not always). However, when a case reaches the Supreme Court, the black and white issues have often been resolved by settlement, fallen by the wayside, or have been resolved by the lower courts by established precedent, case law, or statute. More frequently, the issues we accept for full consideration upon the allowance of a discretionary appeal are now gray -- what did the drafters of the United States or the Ohio Constitutions mean by this broad language we must apply to this narrow fact pattern or to this twentieth century technology issue? What did the legislature intend by this confusing statute? Did the legislature even think that the statute would ever be applied as the parties now contend it should be? Who is right -- the three very experienced appellate court districts who believe this new law is constitutional or the four other equally learned and respected appellate districts who strongly disagree? Does the court or the General Assembly decide public policy? What if public policy is overriding the constitutional rights of a minority? These are tough issues we struggle with daily, seeking that correct interpretation, that fine balancing of rights. I constantly challenge myself as to whether this is the "right" decision or whether I have reached it because my own judicial philosophy colors my outlook. Am I being an activist or deferring too much to the legislature?

There are no simple answers.

{*547} Into this difficult mix comes *Buckeye Community Hope Found. v. City of Cuyahoga Falls*, 81 Ohio St.3d 559, 692 N.E.2d 997 (1998) -- that all-too-complex clash between two groups -- the developer seeking to move forward on an unpopular but worthy project opposed by the homeowners who do not want that project "in their backyard." Both sides have valid, strong legal and emotional arguments; both firmly believe in their cause; both look to us to finally resolve the conflict.

I voted with the majority in *Buckeye Community Hope Found. v. City of Cuyahoga Falls* (1998), 81 Ohio St.3d 559, 692 N.E.2d 997, because I passionately believe in the rights of the voter. It is the cornerstone of our system of justice.

I grew up in three foreign countries as a daughter of American missionaries. I was born in Thailand and attended boarding schools in South Viet Nam and Malaysia. I saw countries governed by military dictators, by monarchs, by anarchy, and by communists. I came from the outside to this country, where the right to vote, though not always exercised, is one of its most cherished foundations, the basis of its representative form of government. The openness of our government, and the power of our vote to determine who represents us in our government, cannot be fully appreciated until one has lived in countries that do not have those privileges.

Therefore, when I considered the first majority opinion, it seemed the right decision. The people should have the ultimate right to decide their own fate, to be the final arbiters of their community's course. The majority's argument was

powerful that Home Rule allowed a chartered municipality to grant its voters the final say. That is the strength of our system.

But I forgot in my zeal to affirm the power of the vote that our forefathers carefully fashioned some checks and balances that are equally a cornerstone to our system. Our system of three equal branches, which balance and check each other, does not exist in many other countries, where the legislature or the courts are merely puppets of the executive branch. Yet, to allow any of the three branches to become more powerful than the other two is to create instability in our system. Underlying the three branches is the right to vote, sometimes direct and sometimes representative. The crafters of our Constitution recognized that sometimes our representatives need some distance from the voting so that they can make a decision that may not be popular at the moment, but may be best or right in the long haul. Thus, state representatives have close accountability with two-year terms, senators are more insulated by four-year terms, and the judiciary by six-year terms -- still accountable but with greater freedom to act as necessary though it may not be popular.

But predictability and stability are also important to the survival of our system. A mere change of our President cannot wipe out decades of law and statutes, as happens in many countries. The legislature acts as the check against the {*548} arbitrary changes of the administrative branch; the courts as a check against both. Homeowners must be secure in the knowledge that their deed to their home will survive the election; businesses must be able to rely on the stability of contracts, zoning laws, tax laws, and laws governing relationships, whether their business is to build factories or to

operate a beauty salon. The loss of stability can result in chaos.

In reconsidering *Buckeye Community Hope Found.*, and in weighing all of those heavy thoughts and constitutional issues, about which volumes have been written, I now join the new majority because I believe it has arrived at the right analysis; I now believe my former view was wrong. I see now that the framers of the Ohio Constitution had a good reason for Section 1f, Article II, in limiting the referendum to legislative decisions only. But to apply the referendum to everyday administrative decisions, even if the charter of the municipality so allows (and I am no longer convinced this is what the drafters of the charter intended), is to submit the minutiae of everyday administrative decision-making to the whim of the voter at the moment. The unpopular development, the disfavored contract with a school principal, the neighbor's new garage approval, or any other decision could be subject to voter disapproval if an angered voter was organized or well-funded enough. Chaos and instability could result. The decisions made by homeowners, developers, schools, or anyone else could no longer depend on established zoning approvals or contracts made -- all could be thrown out at whim.

The law of unintended consequences is "the idea that whenever society takes action to change something, there will be unanticipated or unintended effects." Fortune, Aug., 1996. Sometimes legislative action results in unintentional consequences. Sometimes our actions do also. We make a decision that seems right, constitutional, and just at the time, but cannot always foresee how it can apply in ways we never intended. I now see the danger of my original vote and the

wisdom of the original framers of our Constitution in limiting referendums to legislative actions and in not allowing municipalities to exercise powers greater than the Constitution grants. In this case, Section 1f, Article II trumps the Home Rule Amendment. I believe this is what the Constitution intends. I now so vote accordingly.

DISSENT

DOUGLAS, J., dissenting. I dissent from the judgment and opinion of the majority. Subsequent to our May 6, 1998 decision in *Buckeye Community Hope Found. v. Cuyahoga Falls* (1998), 81 Ohio St.3d 559, 692 N.E.2d 997, appellants filed a motion for reconsideration. However, in granting appellants' motion, the majority has clearly disregarded the requirements of S. Ct.Prac.R. XI. Section 2 {*549} of S. Ct.Prac.R. XI provides that a motion for reconsideration shall be confined strictly to the grounds urged for reconsideration and that the motion "shall not constitute a reargument of the case." Appellants' motion is premised upon essentially the same arguments that were initially presented to this court. In fact, the motion contains absolutely nothing that warrants a change from our original decision. The majority, however, in rehearing the cause for whatever undisclosed reasons, has conveniently ignored the requirements of S. Ct.Prac.R. XI. Oh well, so much for the rules!

In any event, I also dissent from the judgment and the opinion of the majority because I cannot agree with the majority's severe restriction of the sacrosanct right of referendum. What is particularly disturbing is that the majority completely ignores the clear wording of the drafters of Section 1f, Article II and turns the *enabling* provision into an affirmative limitation on the right of referendum. I

continue to believe that our original decision in *Buckeye* is correct, is supported by law, and, most importantly, reflects the fundamental precepts upon which our state and country are based. In that regard it is interesting to recall, during this time of the year, July 4, when we celebrate the founding of our country and our Declaration of Independence, that that sacred document contains the words "that to secure these rights, Governments are instituted among Men, *deriving their just powers from the consent of the governed.*" (Emphasis added.) Today, the majority tells the citizens of Cuyahoga Falls, and all other communities and citizens likely situated, that what they have voted into their charters means nothing because if the charter provision in question here can be negated by the waving of the four-vote magic wand, then no charter provision is truly sacred. So much for "just powers" being derived "from the consent of the governed." Given today's holding, Section 2, Article I of the Ohio Constitution should now read that "all political power is [no longer] inherent in the people."

Finally, this case is *not* about missionaries, separation of powers, length of terms of office, the President, or a "disfavored contract with a school principal." This case *is* about Home Rule Charters voted into existence by electors in municipalities all across this state having nothing to do, of course, with the parade of horribles assembled in the concurring opinion. The citizens of a municipality have the authority to establish the means and methods to govern their own affairs.

Accordingly, I dissent. I would deny the motion for reconsideration and follow our decision reported in 81 Ohio St.3d 559, 692 N.E.2d 997, which affirmed the well-reasoned

judgment of the court of appeals.

RESNICK and F.E. SWEENEY, JJ., concur in the foregoing dissenting opinion.

APPENDIX G

SUPREME COURT OF OHIO

No. 97-137
81 Ohio St.3d 559, 692 N.E.2d 997, 1998 Ohio LEXIS 1204

[Filed May 6, 1998]

BUCKEYE COMMUNITY HOPE FOUNDATION ET AL., *APPELLANTS*,

vs.

CITY OF CUYAHOGA FALLS ET AL., *APPELLEES*.

APPEAL from the Court of Appeals for Summit County, No. 17933.

STATEMENT OF THE CASE

The facts giving rise to this appeal are not in dispute. Appellant Buckeye Community Hope Foundation ("Buckeye Hope") is a nonprofit corporation that develops housing for individuals through the use of low-income housing tax credits. Buckeye Hope is affiliated with Cuyahoga Housing Partners, Inc. and Buckeye Community Three L.P. ("Buckeye Three"), also appellants herein.

On June 12, 1995, Buckeye Three purchased a parcel of land located within the appellee city of Cuyahoga Falls. Appellants intended to construct a seventy-two-unit apartment complex on the parcel. At the time of purchase, the land was zoned for multifamily use. A site plan regarding the proposed development was submitted to the Cuyahoga Falls Planning Commission, which, on February 21, 1996, recommended that the project be approved. Thereafter, in accordance with the Cuyahoga Falls City Charter, the site plan was then submitted to the appellee Cuyahoga Falls City Council for its approval.

On April 1, 1996, city council accepted the recommendation of the planning commission and passed Ordinance No. 48-1996. In Section 1 of the ordinance, council stated, "That this City Council approves the plan for development of land situated in an R-17 Medium Density Multiple Family zoning district in accordance with such district and zoning regulations as stipulated in the Codified Ordinances of the City of Cuyahoga Falls and as approved by the Planning Commission as per the plans and stipulations contained in Planning Commission File P-96-SP.".

Subsequently, referendum petitions were filed with the appellee Cuyahoga Falls Clerk of Council challenging the passage of the ordinance. The petitions were then forwarded to the appellee Summit County Board of Elections. The board of elections determined that the petitions contained a sufficient number of valid signatures.

In an attempt to keep the referendum off the November 1996 ballot, appellants, on May 1, 1996, filed a complaint against appellees in the Court of Common Pleas of Summit County. Appellants sought to enjoin appellees from taking any

further action regarding the referendum process. Appellants also requested a judicial determination that, because the passage of the ordinance constituted merely administrative as opposed to legislative action by council, the ordinance was not subject to challenge by way of referendum. Appellants claimed that Section 1f, Article II of the Ohio Constitution prohibited a referendum on actions taken by a municipal legislative body that were administrative in nature.

The trial court conducted a hearing with respect to appellants' request for injunctive relief. On May 31, 1996, the court ruled in favor of appellees, denying appellants' request for a preliminary or permanent injunction. The court held that the classification of action taken by council in passing Ordinance No. 48-1996, whether administrative or legislative in character, was not dispositive of whether the ordinance could be submitted to a vote of the electors. Rather, the court determined that the ordinance could be voted on because the citizens of Cuyahoga Falls had specifically reserved to themselves such a right under their charter.

Appellants appealed the trial court's decision to the Court of Appeals for Summit County. On December 18, 1996, the court of appeals affirmed the judgment of the trial court.

The cause is now before this court upon the allowance of a discretionary appeal.

HEADNOTE

Municipal corporations--Sections 3 and 7, Article XVIII of the Ohio Constitution confer upon municipalities the authority "to exercise all powers of local self-government"--People of municipality may, by charter, reserve to themselves the power to approve, or reject, by popular vote, any actions of city council.

SYLLABUS

1. Sections 3 and 7, Article XVIII of the Ohio Constitution confer upon municipalities the authority "to exercise all powers of local self-government." Section 1f, Article II of the Ohio Constitution does not limit that authority.

2. In accordance with Section 3 and 7, Article XVIII of the Ohio Constitution, the people of a municipality may, by charter, reserve to themselves the power to approve or reject, by popular vote, any actions of city council regardless of whether such actions are administrative or legislative in nature.

COUNSEL

Zeiger & Carpenter, John W. Zeiger, Jeffrey A. Lipps and Michael N. Beekhuizen; McFarland Law Office and J. Drew McFarland, for appellants.

Virgil Arrington, Jr., Cuyahoga Falls Deputy Law Director, for appellees city of Cuyahoga Falls, Cuyahoga Falls City Council, and Cuyahoga Falls Clerk of Council.

Maureen O'Connor, Summit County Prosecuting Attorney, and William E. Schultz, Assistant Prosecuting Attorney, for appellee Summit County Board of Elections.

Malcolm C. Douglas, urging affirmance for amicus curiae, South Solon Homeowners Association, Inc.

Roger Gupta, pro se, urging affirmance for amicus curiae, Dr. Roger Gupta, Emeritus Professor, Kent State University.

Walter & Haverfield P.L.L., Charles T. Riehl and Fredrick W. Whatley, urging reversal for amicus curiae, Cuyahoga County Law Directors Association.

Fair Housing Law Clinic, Edward G. Kramer, Diane E. Citrino and Kathy J. Grey; Porter, Wright, Morris & Arthur and Robert D. Anderle, urging reversal for amicus curiae, Coalition on Homelessness and Housing in Ohio.

JUDGES

DOUGLAS, J. RESNICK, F.E. SWEENEY and LUNDBERG STRATTON, JJ., concur. MOYER, C.J., PFEIFER and COOK, JJ., dissent.

AUTHOR: DOUGLAS

OPINION

{*562} DOUGLAS, J. The trial court and court of appeals determined that the citizens of Cuyahoga Falls were entitled, by virtue of their city charter, to vote on the passage of Ordinance No. 48-1996. We agree. Accordingly, we affirm the judgment of the court of appeals.

Cuyahoga Falls, as a charter municipality, derives its sovereign power from Article XVIII of the Ohio Constitution. Before 1912, the time of the adoption of Article XVIII, municipalities could exercise only those powers delegated to them by the General Assembly. *Geauga Cty. Bd. of Commrs. v. Munn Rd. Sand & Gravel* (1993), 67 Ohio St.3d 579, 582,

621 N.E.2d 696, 699. With the adoption of Article XVIII, municipalities were given the power to control matters of local concern. In *Perrysburg v. Ridgway* (1923), 108 Ohio St. 245, 255, 140 N.E. 595, 598, the court discussed the underpinnings for the adoption of Article XVIII, and stated:

> "Prior to 1912 there was no express delegation of power to municipalities in the Ohio Constitution. Under the decisions of our courts, it had been held again and again * * * that municipal power was delegated only by virtue of a statute. Therefore, municipalities of the state, especially the larger ones, were continually at the door of Ohio's General Assembly asking for additional political power for municipalities, or modifications in some form of previous delegations of such power. Such power, being legislative only, could be withdrawn from the municipalities, or amended, at any session of the Legislature.
>
> "Municipalities were, therefore, largely a political football for each succeeding Legislature, and there was neither stability of law, touching municipal power, nor sufficient elasticity of law to meet changed and changing municipal conditions. To the sovereign people of Ohio the municipalities appealed in the constitutional convention of 1912, and the Eighteenth Amendment, then known as the 'Home Rule' Amendment, was for the first time adopted as part of the Constitution of Ohio, *wherein the sovereign people of the state expressly delegated to the sovereign people of the municipalities of the state full and complete political power in all matters of 'local self-*

government.'" (Emphasis added and citation omitted.)

{*563} Further, Section 7, Article XVIII "confers power on the municipality to frame and adopt a charter for its government, and to *exercise thereunder* all powers of local self-government as provided by section 3. That is, the people of the municipality are given the power to construct the machinery of their own local government and to operate it themselves." (Emphasis *sic.*) *Froelich v. Cleveland* (1919), 99 Ohio St. 376, 390-391, 124 N.E. 212, 216. See, also, *State ex rel. Hackley v. Edmonds* (1948), 150 Ohio St. 203, 212, 37 Ohio Op. 474, 477, 80 N.E.2d 769, 773 ("It would seem from reading the debates that the Constitutional Convention desired to submit to the electorate of this state amendments to the Constitution to give to municipalities, and particularly to those which adopt charters, the broadest possible powers of self-government in connection with all matters which are strictly local and do not impinge upon matters which are of a state-wide nature or interest."). The words "as are not in conflict with general laws," found in Section 3, Article XVIII, apply only to a city's power to adopt "local police, sanitary and other similar regulations," but not its power to enact laws for "local self-government." See *Rispo Realty & Dev. Co. v. Parma* (1990), 55 Ohio St.3d 101, 103, 564 N.E.2d 425, 427, citing *State ex rel. Canada v. Phillips* (1958), 168 Ohio St. 191, 5 Ohio Op. 2d 481, 151 N.E.2d 722, paragraph four of the syllabus. See, also, *Dies Elec. Co. v. Akron* (1980), 62 Ohio St.2d 322, 325, 16 Ohio Op. 3d 365, 367, 405 N.E.2d 1026, 1028. Additionally, "by reason of Sections 3 and 7 of Article XVIII of the Ohio Constitution, a charter city has all powers of local self-government except to the extent that those powers are taken from it or limited by other provisions of the Constitution or by statutory limitations on the powers of the

municipality which the Constitution has authorized the General Assembly to impose." *Bazell v. Cincinnati* (1968), 13 Ohio St.2d 63, 42 Ohio Op. 2d 137, 233 N.E.2d 864, paragraph one of the syllabus.

Pursuant to Section 7, Article XVIII of the Ohio Constitution, the people of Cuyahoga Falls enacted a charter to govern their local affairs. To that end, Section 2, Article IX of the charter provides that "the electors shall have the power to approve or reject at the polls *any ordinance* or resolution passed by the Council, except as hereinafter provided." (Emphasis added.) In this regard, the people of Cuyahoga Falls reserved to themselves the power to deal directly with and challenge, by referendum, certain actions taken by council. Indeed, such a reservation of power is clearly a matter embraced within the field of local self-government. *Dillon v. Cleveland* (1927), 117 Ohio St. 258, 273-274, 158 N.E. 606, 611. See, also, *State ex rel. Bedford v. Cuyahoga Cty. Bd. of Elections* (1991), 62 Ohio St.3d 17, 19, 577 N.E.2d 645, 647, citing *Fitzgerald v. Cleveland* (1913), 88 Ohio St. 338, 347, 103 N.E. 512, 514 ("'It is clear upon reason and authority that municipal elections are and should be regarded as affairs relating to the municipality itself, and, in the absence of fundamental limitations prohibiting, are things {*564} that may be provided for by the local government. * * *' Accord *Reutener v. Cleveland* [1923], 107 Ohio St. 117, 133, 141 N.E. 27, 31.").

Appellants contend that referendum powers reserved in a municipal charter are not absolute and are expressly limited by Section 1f, Article II of the Ohio Constitution. Section 1f, Article II provides:

"The initiative and referendum powers are hereby

> reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law."

Specifically, appellants contend that the language "authorized by law to control by legislative action," as used in Section 1f, Article II, is one of limitation, restricting the right of referendum to only those actions of council that are purely legislative in nature. Therefore, appellants argue that, because the passage of Ordinance No. 48-1996 constituted merely administrative action by council, the trial court and court of appeals erred in determining that the ordinance could properly be submitted to a referendum vote under the charter.

We agree with appellants that the action of council in approving the site plan was essentially administrative in nature. See *Donnelly v. Fairview Park* (1968), 13 Ohio St.2d 1, 42 Ohio Op. 2d 1, 233 N.E.2d 500, paragraph one of the syllabus ("A public body essentially legislative in character may act in an administrative capacity."). It appears that appellants were at all times in compliance with city zoning laws regarding the proposed development. Further, the action of council in approving the site plan consisted, generally, of executing and administering a zoning law previously enacted. See *Myers v. Schiering* (1971), 27 Ohio St.2d 11, 56 Ohio Op. 2d 6, 271 N.E.2d 864, and *State ex rel. Srovnal v. Linton* (1976), 46 Ohio St.2d 207, 75 Ohio Op. 2d 241, 346 N.E.2d 764. However, we disagree with appellants that the citizens of Cuyahoga Falls are prohibited by Section 1f, Article II from voting on the passage of Ordinance No. 48-1996.

In this case, the court of appeals determined that Section

1f, Article II should not be interpreted as a limitation upon referendum powers reserved in a municipal charter. Specifically, the court held that "while this section does establish that the people of Ohio reserved to themselves a right of referendum, we do not find this language was intended to limit their referendum powers, as Buckeye suggests. The constitution does not dictate how municipalities may incorporate a referendum provision into their governing mechanism; nor does it place restrictions upon the nature of the referendum provisions municipalities may employ. The constitution simply reserves to municipalities the power to incorporate a referendum procedure in order to ensure that decisions made by a municipality's governing body are in keeping with the views of its citizens." We agree with the court of appeals' interpretation of this constitutional provision.

{*565} Section 1f, Article II reserves initiative and referendum powers with respect to all questions which municipalities may be authorized by law to control by legislative action, and such powers are to be exercised in the manner provided by law. By its very terms, Section 1f, Article II is not a "self-executing" provision. *State ex rel. Bramblette v. Yordy* (1970), 24 Ohio St.2d 147, 53 Ohio Op. 2d 348, 265 N.E.2d 273. Rather, Section 1f, Article II requires ancillary legislation to be effective, and, absent specific *legislative action*, by the governing body, "it merely indicates principles [the right of initiative and referendum] without laying down rules giving them force of law." Black's Law Dictionary (6 Ed.1990) 1360, defining "self-executing constitutional provision."

To carry Section 1f, Article II into effect, the General

Assembly has enacted legislation covering municipal initiative and referendum matters.[1] See R.C. 731.28 through 731.41. However, these sections do not apply to "any municipal corporation which adopts its own charter containing an initiative and referendum provision for its own ordinances and other legislative measures." R.C. 731.41. Rather, that source of authority is found in Sections 3 and 7, Article XVIII. In *Bramblette*, 24 Ohio St.2d at 149, 53 Ohio Op. 2d at 349, 265 N.E.2d at 274, we stated:

> "Essentially, we have held that Section 1f of Article II (as contrasted to Section 1d of Article II) is not 'self-executing'; that *either* the General Assembly, by the enactment of statutory 'law,' or the people of the municipality, by the adoption of charter 'law' under the 'home-rule' provisions of the Constitution, may

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[1] The General Assembly has also enacted legislation with respect to referendum powers involving county and township zoning matters. See R.C. 303.12(H) and 519.12(H). In Cook-Johnson Realty Co. v. Bertolini (1968), 15 Ohio St.2d 195, 200-201, 44 Ohio Op. 2d 160, 162-163, 239 N.E.2d 80, 84, this court held:

> "What the General Assembly has done in Section 519.12, Revised Code, is to provide the people of the several townships with a power to veto, by use of the device of referendum, zoning resolutions passed by township trustees.
>
> "We find no constitutional impediment to a grant of legislative power by the General Assembly to township trustees to make zoning resolutions, nor for the General Assembly to reserve the power of referendum to the people who will be affected by such resolutions. Therefore, Section 519.12, Revised Code, insofar as it accomplishes these purposes of the General Assembly, is constitutional."

> exempt certain classes of laws from the operation of referendum * * *; that charter provisions, if so adopted, will apply * * *; R.C. 731.41; and that where there are no charter provisions the exercise of such power is only as provided for by the General Assembly * * *." (Emphasis *sic.*) (Citations and footnote omitted.)

In *Bramblette*, this court held that a municipality may, by charter, exempt an ordinance levying a municipal income tax from referendum proceedings. In reaching this conclusion, the court stated:

> "In providing for referendum, however, a municipal charter is not restricted to the adoption of the same provisions enacted by the General Assembly. It may be {*566} *less restrictive* as to use of the referendum, as was the Charter of the city of Toledo which authorized referendum on *all ordinances*, including one levying a tax passed as an emergency measure. *State ex rel. Snyder v. Bd. of Elections* (1946), 78 Ohio App. 194 [33 Ohio Op. 519, 69 N.E.2d 634]. It may be *more restrictive*, as in *Dillon v. Cleveland*, *supra* * * *, where a referendum would have been required under state law, but was not required under the provisions of the Charter of the city of Cleveland." (Emphasis added.) *Bramblette*, 24 Ohio St.2d at 150, 53 Ohio Op. 2d at 350, 265 N.E.2d at 275.

Thus, given the holdings from this court, and applying Section 1f, Article II as written, we disagree with appellants that Section 1f effectively limits referendum powers reserved in a municipal charter to only those actions of council that are purely legislative in nature. The fact that the charter provision

reserves the power of referendum on "any ordinance or resolution," which may involve administrative as well as legislative matters, does not stand as an impediment to the constitutional validity of the powers reserved to the citizens of Cuyahoga Falls in their charter. See 5 McQuillin, Municipal Corporations (3 Ed.Rev.1996) 289, Section 16.54 ("The power of initiative or referendum may be conferred by the sovereignty upon a municipality with respect to any matter, legislative or administrative, within the realm of local affairs; and often the power, as conferred, is extensive, including all ordinances and resolutions and practically all actions that might be taken by a municipal council."). See, also, *State ex rel. Hauck v. Bachrach* (1958), 107 Ohio App. 71, 76, 7 Ohio Op. 2d 402, 405, 152 N.E.2d 311, 315 ("Section 7 of Article XVIII seems to confer upon any municipality the power to frame and adopt for its government without any limitation whatever as to its form or the distribution of power among its departments. The electors of the community have the option of organizing under any one of the optional statutory forms or any hybrid thereof, or of adopting the old New England 'town meeting' system, or any conceivable new or old form, provided it is based on the will of the electors, expressed in the manner prescribed in Article XVIII of the Constitution.").

In analyzing the scope of authority conferred upon municipalities by Section 7, Article XVIII, appellees correctly point out that "the people of a chartered city can create any form of government they want. There is no requirement that a charter city have a planning commission or even a city council. The people need not hire any planning experts. The people of a city can choose to require that all legislation and site plans be approved by a majority of the voters in a town

meeting. * * * In other words, they may reserve to themselves the power to have a direct democracy on all legislative and administrative functions of the city. The power of local self-government means nothing less. * * *"

{*567} Appellants direct our attention to *Myers* and *Srovnal*, and assert that those cases "control the outcome of this case." Appellants contend that both *Myers* and *Srovnal* stand for the proposition that administrative determinations by a legislative municipal body are not subject to referendum "regardless of whether the municipality is chartered or not."

In Myers, paragraphs one and two of the syllabus, we held:

> "1. Under Section 1f of Article II of the Ohio Constitution, municipal referendum powers are limited to questions which municipalities are 'authorized by law to control by legislative action.'
>
> "2. The passage by a city council of a resolution granting a permit for the operation of a sanitary landfill, pursuant to an existing zoning regulation, constitutes administrative action and is not subject to referendum proceedings."

In *Srovnal*, we relied upon *Myers*, and held:

> "Where the city council, under favor of the city's Planning and Zoning Code, by resolution confirms the action of the city planning and zoning commission granting a zoning use exception as to height regulations for a hotel and office building, which exception will not, in the judgment of the commission,

> substantially and permanently injure the appropriate use of neighboring property, and the applicant for such use exception files notarized consents of the owners of 89.47 percent of the area of the land deemed by the commission to be immediately affected by the proposed zoning use exception, such resolution is not legislative but is an administrative act and is not subject to the referendum provisions of R.C. 731.29."

At first glance, both *Myers* and *Srovnal* appear to be supportive of appellants' contentions. However, both cases are distinguishable and are not applicable here. In neither *Myers* nor *Srovnal* did we determine whether a charter provision could constitutionally authorize citizens to challenge the actions of a municipal legislative authority. To be sure, neither *Myers* nor its progeny, *Srovnal*, dealt with referendum powers granted by charter. Thus, appellants' reliance on these cases is misplaced.

Appellants also cite *Forest City Ent., Inc. v. Eastlake* (1975), 41 Ohio St.2d 187, 70 Ohio Op. 2d 384, 324 N.E.2d 740, as further authority for the proposition that the passage of Ordinance No. 48-1996 was not subject to referendum proceedings. In that case, a landowner challenged a city charter provision that required that any change in land use agreed to by the city council must be approved by fifty-five percent of the voters in a city-wide election. Relying on *Myers*, the *Eastlake* court, in Part II of the opinion, indicated that a charter provision could not provide for a referendum with respect to administrative determinations made by city council. In *Eastlake*, the court stated:

> {*568} "Under the provisions of Section 3, Article VIII [of the charter], *all* changes in land use require

> approval by city council. On its face, the charter provision makes no distinction between those changes made by council in an administrative capacity, and those made by council in a legislative capacity. Thus, the requirement of a mandatory referendum falls upon all changes with equal weight. Insofar as this purports to mandate a referendum as to an administrative determination, it is clearly invalid.
>
> "* * *
>
> "However, construing the mandatory referendum requirement as applying only to those land-use changes granted by council acting in a legislative capacity, we must determine whether such a requirement denies appellant due process of law." (Emphasis *sic.*) (Citations omitted.) *Id.*, 41 Ohio St.2d at 191, 70 Ohio Op. 2d at 386, 324 N.E.2d at 743-744.

The *Eastlake* court then held that the municipal charter provision at issue was an unlawful delegation of legislative power in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. However, the court in *Eastlake* did not address the scope of referendum power with respect to the authority conferred upon municipalities by Sections 3 and 7, Article XVIII of the Ohio Constitution. Rather, the court in Part II of *Eastlake* simply relied on our holding in *Myers*, which, as noted above, did not involve referendum powers granted by a charter. In this regard, we specifically disapprove of the dicta in Part II of *Eastlake* to the extent that it may be interpreted to undermine the authority conferred upon chartered municipalities by Sections 3 and 7, Article XVIII.

Furthermore, we also note that, on appeal, the United States Supreme Court overruled the part of *Eastlake* wherein this court held that the charter provision providing for a mandatory referendum was an unlawful delegation of legislative power. See *Eastlake v. Forest City Ent., Inc.* (1976), 426 U.S. 668, 96 S. Ct. 2358, 49 L. Ed. 2d 132. Specifically, the United States Supreme Court held that such a provision in a charter was constitutional, and stated:

> "The conclusion that Eastlake's procedure violates federal constitutional guarantees rests upon the proposition that a zoning referendum involves a delegation of legislative power. A referendum cannot, however, be characterized as a delegation of power. Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. See, *e.g.*, The Federalist No. 39 (J. Madison). In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature. *Hunter v. Erickson*, 393 U.S. 385, 392 [89 S. Ct. 557, 561, 21 L. Ed. 2d 616, 623] (1969).
>
> {*569} "The reservation of such power is the basis for the town meeting, a tradition which continues to this day in some States as both a practical and symbolic part of our democratic processes. The referendum, similarly, is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies. The practice is designed to 'give citizens a voice on questions of public policy.' *James v. Valtierra*

> [(1971), 402 U.S. 137, 28 L. Ed. 2d 678, 91 S. Ct. 1331], at 141 [402 U.S. 137, 91 S. Ct. 1331, at 1333, 28 L. Ed. 2d 678, at 682]." (Footnotes omitted.) *Eastlake v. Forest City Ent., Inc.*, 426 U.S. at 672-673, 96 S. Ct. at 2361-2362, 49 L. Ed. 2d at 137.

Therefore, we hold that Sections 3 and 7, Article XVIII of the Ohio Constitution confer upon municipalities the authority "to exercise all powers of local self-government." Section 1f, Article II of the Ohio Constitution does not limit that authority. Accordingly, in accordance with Sections 3 and 7, Article XVIII, the people of a municipality may, by charter, reserve to themselves the power to approve or reject, by popular vote, any actions of city council regardless of whether such actions are administrative or legislative in nature.

In *State ex rel. Doerfler v. Otis* (1918), 98 Ohio St. 83, 94, 120 N.E. 313, 316, we held that "where the language of a charter is plain, clear, and unambiguous, it must be given its usual and ordinary meaning, and if such construction is not in accord with the intent and purpose of the electors the remedy is by amendment of the charter." Section 2, Article IX of the charter is plain, clear, and it unambiguously states that the people of Cuyahoga Falls "have the power to approve or reject at the polls *any ordinance or resolution* passed by Council, except as hereinafter provided."[2] (Emphasis added.)

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[2] Additionally, even assuming, *arguendo*, that Section 2, Article IX of the charter is ambiguous (which it clearly is not), this court has held that any ambiguity in a charter provision should be liberally construed in favor of permitting the people to vote on the issue. See *State ex rel. Sharpe v. Hitt* (1951), 155 Ohio St. 529, 535, 44 Ohio Op. 489, 491, 99 N.E.2d 659, 662 ("This and

The exceptions to referendum {*570} set forth in the charter are not applicable here.[3] The referendum provision in the

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other courts have declared that constitutional, statutory or charter provisions for municipal initiative or referendum should be liberally construed in favor of the power reserved so as to permit rather than preclude the exercise of such power, and the object clearly sought to be attained should be promoted rather than prevented or obstructed."), citing *State ex rel. Middletown v. Middletown City Comm.* (1942), 140 Ohio St. 368, 24 Ohio Op. 297, 44 N.E.2d 459. See, also, *State ex rel. Lewis v. Hamilton Cty. Bd. of Elections* (1995), 74 Ohio St.3d 1201, 1202, 655 N.E.2d 177, 178 (Moyer, C.J., concurring) ("Active participation in the election process is the foundation of democracy. Whether selecting a candidate for public office or deciding issues of public concern, voting is a basic right without which all other rights become meaningless. It follows that where the Ohio Constitution or statutes establishing the requirement for placing issues on election ballots create doubt, such doubt should be resolved in favor of providing the citizens with access to the ballot."); and *Shryock v. Zanesville* (1915), 92 Ohio St. 375, 386, 110 N.E. 937, 940 ("Meanwhile it is the solemn duty of all courts to keep hands off and to avoid giving to the provisions of the constitution on that subject [initiative and referendum] a strained construction which, by reason of its very burdensomeness and unreasonableness, would tend to depopularize it. Such character of construction is as unwarranted as judicial construction tending to weaken or emasculate the theory [of initiative and referendum].").

[3] Section 2, Article IX of the Cuyahoga Falls Charter also provides that "when the Council by general law or under provisions of general ordinance is required to pass more than one ordinance or resolution necessary to make and pay for any public improvement, the referendum provision shall apply only to the first ordinance or resolution required to be passed and not to any

charter does not provide for, or even suggest, any distinctions between actions by council that are legislative or administrative in character. In this regard, the people of Cuyahoga Falls have, by virtue of their charter, reserved to themselves the right to exercise a part of their inherent political power[4] and determine what actions of council are subject to a referendum vote. The people of Cuyahoga Falls have spoken through their charter, and we will not disturb their clear intentions.

For all the foregoing reasons, we affirm the judgment of the court of appeals.

Judgment affirmed.

Resnick, F.E. Sweeney and Lundberg Stratton, JJ., concur.

Moyer, C.J., Pfeifer and Cook, JJ., dissent.

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subsequent ordinances or resolution relating thereto. In addition, ordinances providing for an annual tax levy or for improvements petitioned for by the owners of a majority of the foot front of the property benefited and to be specially assessed therefor, and appropriation ordinances limited to the subject of apporpriations [*sic*] shall not be subject to referendum, but, except as herein provided, all other ordinances and resolutions necessary for the immediate preservation of the public peace, health or safety, including emergency ordinances and resolutions necessary for the immediate preservation of the public peace, health or safety, shall be subject to referendum, except that such emergency ordinances and resolutions shall go into effect at the time indicated therein."

[4] Indeed, "all political power is inherent in the people." See Section 2, Article I of the Ohio Constitution.

DISPOSITION

Judgment affirmed.

DISSENT

MOYER, C.J., dissenting. I respectfully dissent because the citizens of a municipality may not exercise powers of referendum, by charter or other means, greater than those powers granted by Section 1f, Article II of the Ohio Constitution.

I

Paragraph one of the syllabus in the majority opinion states that Section 1f, Article II of the Ohio Constitution does not limit the authority of municipalities to exercise the powers of self-government conferred by Sections 3 and 7 of Article XVIII. I disagree.

{*571} While the Home Rule Amendment grants broad powers to municipalities, the scope of those powers is confined by the remaining clauses of the Constitution. Section 3, Article XVIII provides, "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." In *Canton v. Whitman* (1975), 44 Ohio St.2d 62, 73 Ohio Op. 2d 285, 337 N.E.2d 766, this court interpreted Section 3, Article XVIII: "This section, adopted in 1912, preserved the supremacy of the state in matters of 'police, sanitary and other similar regulations,' while granting municipalities sovereignty in matters of local self-government, *limited only by other constitutional provisions*. Municipalities may enact police and similar regulations under their powers

of local self-government, but such regulations 'must yield to general laws of statewide scope and application * * *.' " (Emphasis added.) *Id.* at 65, 73 Ohio Op. 2d at 287, 337 N.E.2d at 769. Thus, true sovereignty of municipal governments can be limited only by other provisions of the Constitution with respect to matters that are not of "police, sanitary and other similar regulations." Conversely, it is evident that matters of "police, sanitary and other similar regulations" are subject to the supremacy of state power, *i.e.*, "general laws of statewide scope and application," as well as other provisions of the Constitution that may limit the exercise of this power.

Similarly, we described the limits of charter government by interpreting Section 7, Article XVIII, as follows: "A municipality that chooses to adopt a charter does so in order to manage its own purely local affairs without interference from the state, *with the understanding that those local laws will not conflict with the constitution and general laws.*" (Emphasis added.) *Rispo Realty & Dev. Co. v. Parma* (1990), 55 Ohio St.3d 101, 102, 564 N.E.2d 425, 426-427.

In *Bazell v. Cincinnati* (1968), 13 Ohio St.2d 63, 42 Ohio Op. 2d 137, 233 N.E.2d 864, paragraph one of the syllabus, the court held that a "charter city has all powers of local self-government *except to the extent that those powers are taken from it or limited by other provisions of the Constitution* or by statutory limitations on the powers of the municipality which the Constitution has authorized the General Assembly to impose." (Emphasis added.) Therefore, any exercise of municipal authority under charter and pursuant to Section 3 must not, in order to be valid, conflict with any remaining provision of the Constitution. In essence, the authority to

"exercise all powers of local self-government" is a delegation of the power to exercise all powers that are within the bounds of the Constitution.

The constitutional provision at issue here is Section 1f, Article II, which states that "the initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter {*572} be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law."

Assuming, without analyzing, that the majority is correct in concluding that Section 1f, Article II is not a self-executing provision, see *State ex rel. Bramblette v. Yordy* (1970), 24 Ohio St.2d 147, 53 Ohio Op. 2d 348, 265 N.E.2d 273, governing bodies that may act to execute the powers of referendum and initiative as stated in Section 1f, Article II are municipal legislative bodies, where a municipality is governed by charter, and the General Assembly, which provides governing law on referendum and initiative matters for noncharter municipalities. R.C. 731.28 through 731.41.

However, when either a city council of a charter municipality or the General Assembly acts to execute the powers of Section 1f, Article II, the powers conferred by such an action cannot, by the very nature of the source, exceed the scope of the referendum and initiative powers contained in Section 1f, Article II. The legislative body may act only to execute those referendum and initiative powers that were reserved to the people of municipalities, by the people of the state, as stated in Section 1f, Article II.

As the United States Supreme Court stated in *Eastlake v.*

Forest City Ent., Inc. (1976), 426 U.S. 668, 672, 96 S. Ct. 2358, 2361, 49 L. Ed. 2d 132, 137, "under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create." Therefore, to the extent that the action of a legislative body is required to execute power that the people have reserved for themselves, i.e., to execute a nonself-executing provision, the legislative body, in doing so, may not go beyond the power that has been reserved. Such an improper action would violate the intentions of the people of Ohio who established the Constitution, with the principle, among others, that any powers not so kept are assigned by the people, to be considered and decided on behalf of the people, by their representatives in legislative bodies.

Applying these principles to the majority's analysis of the "nonself-executing" nature of Section 1f, Article II, it is apparent that the majority's conclusions are not correct. In arriving at the determination that Section 1f, Article II does not limit the authority of municipalities to exercise local governing power, the majority confuses the original source of authority for initiative and referendum measures. The majority's view implies that all a legislative body must do to execute Section 1f, Article II is enact legislation providing for initiative and referendum rights. Under the majority's conclusions, charter municipalities may grant greater initiative and referendum rights than the General Assembly may grant to noncharter municipalities, despite the fact that the source for granting these powers in both cases is the same--Section 1f, Article II.

{*573} For charter municipalities, the source of authority, according to the majority, is "found in Sections 3 and 7,

Article XVIII." However, what this truly means is that the *source of authority to carry into effect* Section 1f, Article II, for charter municipalities, is Sections 3 and 7 of Article XVIII. The source of authority to carry into effect Section 1f, Article II, for the General Assembly, is Section 1, Article II. Those provisions used to carry into effect Section 1f, Article II are limited to executing only the powers specified in Section 1f, Article II. There is no constitutional authority given by the people to go beyond the meaning of Section 1f, Article II.

By its syllabus that Section 1f, Article II does not limit the authority of municipalities to "exercise all powers of local self-government," the majority has overlooked that any action to carry into effect the provisions of Section 1f, Article II must be consistent with the limits established by that provision, since *it is the sole constitutional source of referendum and initiative powers*. Otherwise, the meaning of any constitutional provision we deem to be nonself-executing could be altered by the words of the legislation that is enacted to carry the provision into effect. The grant of local governing power to carry into effect Section 1f, Article II is therefore limited to actions that are consistent with the words of that provision.

Therefore, an analysis of Section 1f, Article II is required to determine the scope of referendum and initiative powers that the people have reserved to themselves and, correspondingly, what powers are delegated to the legislative branches. It is this analysis that then determines the validity of the charter provision at issue here, i.e., whether the powers of referendum and initiative granted by that charter provisions are within the bounds of Section 1f, Article II.

II

"The first step in determining the meaning of a constitutional provision is to look at the language of the provision itself." *State ex rel. Maurer v. Sheward* (1994), 71 Ohio St.3d 513, 520, 644 N.E.2d 369, 375. Section 1f, Article II provides, in part, that "the initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by *legislative action*." (Emphasis added.) Therefore, whether the submission of the issue to the voters by the city in this case was constitutional turns on the meaning of "legislative action," and if that issue was one that the municipality was authorized to determine by legislative action.

Words used in the Constitution that are not defined therein must be taken in their usual, normal, or customary meaning. See *State ex rel. Herman v. Klopfleisch* (1995), 72 Ohio St.3d 581, 584, 651 N.E.2d 995, 998; R.C. 1.42. {*574} Black's Law Dictionary (6 Ed.1990) 899, defines "legislative" as "making or giving laws; * * * actions which relate to subjects of permanent or general character are 'legislative.' " Similarly, "legislative act" is defined as the "enactment of laws. Law * * * passed by legislature in contrast to court-made law. *One which prescribes what the law shall be in future cases arising under its provisions*." (Emphasis added.) *Id*. Accordingly, the phrase "legislative action," taken in its usual and customary meaning, is essentially the process by which law is enacted that prescribes what the law shall be in future cases arising under its provisions. The wording of Section 1f, Article II therefore means that initiative and referendum powers are reserved on all questions that a municipality may determine legislatively, *i.e.*, on all questions that are resolved by enacting laws that have a general,

prospective application.

In determining whether the issue here was one that the city was authorized to control by legislative action, it first must be understood that the distinction by this court in the past, and by the parties here, between "legislative" and "administrative" actions does not truly capture the actual meaning of "legislative action" as stated in Section 1f, Article II. That distinction is incorrect because administrative actions may include, according to general principles of administrative law, the performance of "quasi-legislative," or rulemaking, as well as "quasi-judicial," or adjudicatory, functions. The true determination to be made is whether a city council, acting pursuant to its administrative powers, see *Donnelly v. Fairview Park* (1968), 13 Ohio St.2d 1, 42 Ohio Op. 2d 1, 233 N.E.2d 500, paragraph one of the syllabus, is acting in a legislative or judicial capacity. Indeed, the first step in analyzing an administrative action is to determine whether the process is one of adjudication or rulemaking. 1 Koch, Administrative Law and Practice (2 Ed.1997) 45, Section 2.11.

An administrative action that is adjudicatory is a "determination of individual rights or duties." *Id.* It is a decision-making process that applies "preexisting standards to individual circumstances," and uses the specific facts of the case "to decide whether a given rule is applicable." Any resultant policy making is incidental to the dispute. *Id.* at 46. See, also, *Londoner v. Denver* (1908), 210 U.S. 373, 28 S. Ct. 708, 52 L. Ed. 1103. Administrative adjudications are often initiated by private citizens. "Private individuals find that they cannot engage in a certain conduct or activity without clearance from an administrative agency." 2 Koch at

119, Section 5.31. "The applicant will first receive an administrative determination and the hearing will result only if the applicant chooses to challenge the result of that determination. One aspect of an application for a license or permit is that there are competing private interests." *Id.*

By contrast, rulemaking is more like the activity of legislating. See 1 Koch at 47, Section 2.11. While the processes used to establish rules sometimes differ {*575} from typical legislative processes, the objective and the outcome of rulemaking is similar--the implementation of law or policy for the future. See *United States v. Florida East Coast Ry. Co.* (1973), 410 U.S. 224, 244-246, 93 S. Ct. 810, 820-821, 35 L. Ed. 2d 223, 239-240. Rulemaking is characterized by a focus on general issues that affect future conduct, with an intent on making policy determinations: "The core facts in rulemaking are general facts. Rulemaking is investigation rather than individual dispute resolution and hence it is often said to be by nature legislative. It is a legislative-like activity because it focuses on resolving some sort of policy-type question and not merely resolution of factual disputes." 1 Koch at 48, Section 2.11. See, also, *Bi-Metallic Investment Co. v. State Bd. of Equalization* (1915), 239 U.S. 441, 36 S. Ct. 141, 60 L. Ed. 372. Many of the rules established pursuant to the rulemaking process envision some form of public participation, a feature which is not apparent in adjudicatory proceedings. See 1 Koch at 325-326, Section 4.11.

The difference between adjudicatory and rulemaking administrative actions is important because city councils may preside over the performance of these functions by a variety of administrative agencies. "[A] city council may perform not

only legislative acts, but administrative acts as well." *Myers v. Schiering* (1971), 27 Ohio St.2d 11, 13, 56 Ohio Op. 2d 6, 7, 271 N.E.2d 864, 865. "A public body essentially legislative in character may act in an administrative capacity." *Donnelly*, at paragraph one of the syllabus. When a city council has acted to approve or exercise final decision over an "administrative action" by an agency, as has happened in this case, the underlying nature of the act, *i.e.*, adjudicatory or legislative, is critical because it is determinative of whether the final action by city council constitutes "legislative action," or whether council is acting as the final arbiter in an adjudicatory process. If, for example, a city council participates as the final decisionmaker in the rulemaking process by approving the establishment of a rule, then it may be said that the council has acted, albeit in an administrative capacity, by "legislative action." It has acted pursuant to a process that enacts law prescribing what the law shall be in future cases arising under its provisions. By contrast, if a city council has acted as the final decisionmaker in an adjudicatory matter that involves a determination of individual rights or duties by applying preexisting standards to a specific set of facts, then the action taken, whether by resolution or ordinance, cannot be said to be legislative. Rather, council is acting as a final arbiter, which cannot constitute "legislative action" that would permit the people to exercise initiative and referendum rights over such an action pursuant to Section 1f, Article II.

Applying those principles to this case, it is evident that the Cuyahoga Falls City Council acted in an adjudicatory manner when it passed Ordinance No. 48-1996 approving the plan for "development of land situated in an R-17 Medium Density Multiple Family zoning district in accordance with such

district and {*576} zoning regulations as stipulated in the Codified Ordinances of the City of Cuyahoga Falls and as approved by the Planning Commission as per the plans and stipulations contained in Planning Commission File P-6-96-SP." By the very words of the ordinance, the action by the council approves the Planning Commission's application of the zoning regulations to Buckeye's plan. Thus, the ordinance is a final determination of an application of the preexisting zoning standards to the individual plan submitted by the appellees. There are no rules approved in the ordinance, of the Planning Commission or any other agency, that are general and prospective in nature. There is no approval of any general public policy. The action taken by city council was an adjudicatory administrative action, which cannot by any definition fall under the phrase "legislative action" enumerated in Section 1f, Article II. Thus, there are no initiative or referendum rights which may be exercised on this question.

An analysis of the cases upon which Buckeye relies, *Myers v. Schiering*, and *State ex rel. Srovnal v. Linton* (1976), 46 Ohio St.2d 207, 75 Ohio Op. 2d 241, 346 N.E.2d 764, illustrates the correctness of the above approach in analyzing the true nature of "administrative actions" in interpreting "legislative action" under Section 1f, Article II. Like the case here, the underlying administrative actions in both cases were individualized, fact-specific matters which required an application of existing regulations to each circumstance. In *Myers*, the city council passed a resolution granting a permit to operate a landfill. In *Srovnal*, the city council adopted a resolution approving the Solon Planning and Zoning Commission's issuance of a permit to build a hotel and office complex. *Srovnal*, 46 Ohio St.2d at 209, 75 Ohio Op. 2d at 242, 346 N.E.2d at 765-766. In both cases, this court held

that the actions were not subject to referendum. *Myers*, at paragraph two of the syllabus; *Srovnal*, at syllabus. As in this case, both of the administrative actions there were adjudicatory in nature.

III

The majority opinion rests upon the assumption that because of Article XVIII, there is a difference in the initiative and referendum powers enjoyed by charter municipalities as opposed to noncharter municipalities. The majority's distinction is one without a difference. Neither a charter nor a noncharter municipality can grant greater powers than those allowed by the Ohio Constitution. In this case, neither can grant more initiative or referendum power than what is permitted by Section 1f, Article II. An executing action going beyond the scope of Section 1f, Article II is not a valid action because there is no constitutional authority for such an action.

{*577} For the foregoing reasons, the judgment of the court of appeals should be reversed.

Pfeifer, J., concurs in the foregoing dissenting opinion.

COOK, J., dissenting. Section 1f, Article II of the Ohio Constitution reserves the powers of referendum and initiative to the voters of Ohio's municipalities. Under that section, however, referendum and initiative are available only with regard to "legislative action." Nothing in either Section 1f, Article II, or the Home Rule Amendment, permits a municipality to overcome this limitation by adopting a charter that allows for broader powers of initiative and referendum. The powers of self-government possessed by a municipality pursuant to the Home Rule Amendment to the Ohio Constitution may not exceed the limitations placed on those

powers by other constitutional provisions. *State ex rel. Bedford v. Cuyahoga Cty. Bd. of Elections* (1991), 62 Ohio St.3d 17, 20-21, 577 N.E.2d 645, 647-648. Moreover, whether the municipality is chartered or nonchartered is irrelevant: Section 1f, Article II of the Constitution is the sole grant of referendum and initiative powers to both types of municipalities and its limitation applies equally.

For the foregoing reasons, I concur in Part I of Chief Justice Moyer's dissenting opinion.

APPENDIX H

COURT OF APPEALS OF OHIO
NINTH APPELLATE DISTRICT
SUMMIT COUNTY

C.A. NO. 17933

December 11, 1996, Dated

BUCKEYE COMMUNITY HOPE FOUNDATION, ET AL., Appellants

vs.

CITY OF CUYAHOGA FALLS, ET AL., Appellees

APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT. COUNTY OF SUMMIT, OHIO. CASE NO. CV96-05-1701.

COUNSEL

APPEARANCES:

JEFFREY A. LIPPS AND GREGORY D. BRUNTON, Attorneys at Law, Zeiger & Carpenter, 1600 Huntington Center, Columbus, Ohio 43215, for Appellants.

J. DREW MCFARLAND AND RICHARD D. FEIL, III, Attorneys at Law, McFarland Law Office, 120 East Broadway, Suite 200, Granville, Ohio 43023-1304, for Appellants.

VIRGIL ARRINGTON, JR., Deputy Law Director, City of Cuyahoga Falls, 2310 Second Street, Cuyahoga Falls, Ohio 44221, for Appellee.

MAUREEN O'CONNOR, Summit County Prosecutor, AND WILLIAM E. SCHULTZ, Assistant Prosecutor, 53 University Avenue, Akron, Ohio 44308, for Appellee.

JUDGES

JOHN W. REECE, Judge. BAIRD, P.J., SLABY, J., CONCUR

AUTHOR: REECE

OPINION

DECISION AND JOURNAL ENTRY

Dated: December 11, 1996

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

REECE, Judge.

Appellant Buckeye Community Hope Foundation appeals the decision of the Summit County Court of Common Pleas denying preliminary and permanent injunctive relief. We affirm.

I.

Buckeye Community Hope Foundation is a non-profit organization which develops property for the purpose of creating affordable housing opportunities. On June 12, 1995, Buckeye purchased a parcel of land located in the city of Cuyahoga Falls to use for this purpose. Early in 1996, Buckeye submitted a site plan proposal for the construction of a seventy two unit apartment complex on the parcel to the City of Cuyahoga Falls Planning Commission. The Planning Commission approved the site plan and, pursuant to the Cuyahoga Falls Municipal Charter, the proposal was referred to the Cuyahoga Falls City Council. On April 1, 1996, the City Council approved the site plan by passing ordinance # 48-1996.

In response to the passage of ordinance # 48-1996 by the City Council, certain Cuyahoga Falls electors who opposed the housing project circulated a referendum petition to place the issue on the November, 1996 ballot. The voters filed the petition with the Clerk of the City Council, seeking that ordinance # 48-1996 be submitted to a vote of the electors, as provided for by Article IX, Section 2 of the Cuyahoga Falls Municipal Charter. The Board of Elections certified the referendum petition as valid. In light of the pending referendum, the City Council refused to issue a building permit to Buckeye.

In an attempt to keep the referendum off the November ballot, Buckeye filed an action against the City Council in common pleas court. The complaint sought injunctive relief and a declaratory judgment against the City Council. Buckeye alleged that the passage of Ordinance # 48-1996 was an administrative act by the council and as such, submission of

the ordinance to a referendum violated the Ohio Constitution. Further, Buckeye alleged the referendum prejudiced them in that it prevented them from commencing construction of the proposed apartment complex. Buckeye sought injunctive relief to halt the placement of the referendum on the November ballot.

On May 15, 1996 the trial court heard Buckeye's motion for injunctive relief. The parties agreed to consider the hearing as a trial on the merits of the case. On May 31, 1996, the common pleas court ruled that the charter of Cuyahoga Falls reserved to the citizens the right of referendum for ordinances such as # 48-1996. Thus, the court denied Buckeye both preliminary and permanent injunctive relief, thereby dismissing the action. The court noted that the judgment was a final appealable order. Following the entry of judgment, Buckeye appealed to this court.

II.

Buckeye asserts the following assignment of error:

> The Trial Court erred to the prejudice of the Plaintiffs-Appellants by denying Plaintiffs-Appellants' motion to (*sic.*) for temporary restraining order and for preliminary and permanent injunctive relief.

Buckeye contends injunctive relief to stop the referendum is proper because the referendum procedure is inappropriate in this instance. It argues citizens may only exercise the right of referendum as a challenge to legislative action by a municipality. Buckeye charges the passage of ordinance # 48-1996 was an administrative action by the City Council and, as such, should not have been subject to a referendum. We disagree.

The City of Cuyahoga Falls is a chartered municipality, deriving its power from Article XVIII of the Ohio Constitution. Article XVIII, known as the Home Rule Amendment, was adopted in 1912 and constructed to allow individual municipalities the power to control their own local affairs. Section three of the Home Rule Amendment specifically gives municipalities "authority to exercise all powers of local self-government[.]" Section 3, Article XVIII, Ohio Constitution. Further, Section 7 of the amendment provides that "any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government." Section 7, Article XVIII, Ohio Constitution.

In keeping with the Home Rule provisions of the constitution, the citizens of Cuyahoga Falls enacted a charter by which they chose to govern themselves. In this charter the citizens incorporated the means by which they would order and control the affairs of the municipality. Section 2, Article 9 of the Cuyahoga Falls charter states "the electors shall have the power to approve or reject at the polls *any* ordinance or resolution passed by the Council[.]" (Emphasis added.) By including this section in the charter, the citizens of Cuyahoga Falls reserved to themselves the right of referendum on all actions of the council, as the Ohio Constitution entitles them to do under the Home Rule Amendment. See *Village of Perrysburg v. Ridgway* (1923) 108 Ohio St. 245, 140 N.E. 595.

Buckeye argues the referendum provision of the charter may only be applied to legislative decisions made by the city council. It charges that, pursuant to Section 1(f), Article II of

the Ohio Constitution, citizens of municipalities are not allowed a right of referendum for administrative actions. Section 1(f) provides:

> The initiative and referendum powers are hereby reserved to the people of each municipality on all questions such municipalities may now or hereafter be authorized to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.

Section 1(f), Article II, Ohio Constitution.

While this section does establish that the people of Ohio reserved to themselves a right of referendum, we do not find this language was intended to limit their referendum powers, as Buckeye suggests. The constitution does not dictate how municipalities may incorporate a referendum provision into their governing mechanism; nor does it place restrictions upon the nature of the referendum provisions municipalities may employ. The constitution simply reserves to municipalities the power to incorporate a referendum procedure in order to ensure that decisions made by a municipality's governing body are in keeping with the views of its citizens.

Municipalities are not prohibited from expanding upon the referendum rights included in the constitution. See *State ex rel. Bramblette v. Yordy* (1970), 24 Ohio St.2d 147, 265 N.E.2d 273. Section 1(f), Article II provides a minimum referendum standard which applies to all municipalities. Citizens of chartered municipalities may choose to expand the right of referendum beyond this standard. The Home Rule Amendment, adopted after Section 1(f), Article II, increased the self-governing powers of municipalities and allowed the

extension of referendum rights through municipal charter provisions. See *Dillon v. Cleveland* (1927), 117 Ohio St.. 258, 158 N.E. 606. Thus, the referendum right of citizens of chartered municipalities is not limited to legislative actions.

The Home Rule Amendment of the Constitution resolves the question of the power of local self-government under a city charter. *Piqua v. Piqua Daily Call* (1979), 64 Ohio App.2d 222, 225, 412 N.E.2d 1331. Home Rule gives municipalities a sovereignty over matters of local government. In such matters, if a provision of a municipal charter conflicts with state law, the charter provisions will prevail. *State ex rel. Bardo v. Lyndhurst* (1988), 37 Ohio St.3d 106, 108-109, 524 N.E.2d 447. A municipal charter provision incorporating stricter referendum provisions than provided for by state statute is a constitutional exercise of municipal power. See *Dillon v. Cleveland* (1927), 117 Ohio St. at 172-176. This court relied upon *Dillon* when it held a stricter charter initiative provision to be constitutional in a journal entry judgment in *State ex rel. Samanich v. Vierkorn* (July 12, 1995), 1995 Ohio App. LEXIS 2972, Lorain App. No. 95 CA 006149, unreported. Thus, the citizens of Cuyahoga Falls, under Home Rule, may reserve to themselves in their charter the right of referendum over "any ordinance or resolution," whether legislative or administrative, without sanction by the state.

The right of referendum is "a classic demonstration of 'devotion to democracy[.]'" *Eastlake v. Forest City Enterprises, Inc.* (1976), 426 U.S. 668, 679, 49 L. Ed. 2d 132, 141, 96 S. Ct. 2358. (Citation omitted.) A referendum is more than "an expression of *** neighborhood preference;" it is a mechanism for the citizens of a municipality to assert

their interests and maintain a check over their elected representatives. *Id.* at 678, 49 L. Ed. 2d at 140. (Citation omitted.) The people may reserve to themselves the power of referendum in order to ensure their direct participation in the political process and to protect their interest in questions of public policy. *Id.* at 673, 49 L. Ed. 2d at 137. The people of Cuyahoga Falls included the referendum provision in their charter in order to maintain a degree of direct control over their municipality's management of policy issues. They have used the referendum procedure for that purpose in this instance.

As provided for by the Home Rule Amendment of the Ohio Constitution, the citizens of Cuyahoga Falls formulated a city charter by which to govern themselves. Within that charter they protected their interest in public policy concerns by reserving to themselves the right to review "any ordinance or resolution" passed by the city council. The people have chosen to assert this right in order to review the passage of ordinance # 48-1996.

III.

Buckeye's single assignment of error is overruled. The decision of the trial court denying preliminary and permanent injunctive relief is affirmed. Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Summit Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall

constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Costs taxed to Appellants.

Exceptions.

JOHN W. REECE

FOR THE COURT

BAIRD, P.J.

SLABY, J.

CONCUR

DISPOSITION

Judgment affirmed.

APPENDIX I

COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

Case No. CV 96 05 1701

BUCKEYE COMMUNITY HOPE FOUNDATION, et al., *Plaintiffs*	)
vs.	)
CITY OF CUYAHOGA FALLS, et al., *Defendants*	)

JUDGMENT ORDER
May 31, 1996, Dated

Judge Murphy,

This cause came on before this Court on the 15th day of May, 1996, for preliminary and permanent injunction (agreed to and consolidated by the parties at said hearing.) Upon the Plaintiffs' request that the Court issue an injunction barring the Cuyahoga Falls city Council from approving a referendum vote I and transmitting said request for inclusion on the ballot this year, which had been initiated by certain electors of their community.

Chronologically, the city Council had approved certain plans of the Plaintiffs for a housing development in their community after which a group of citizens had petitioned for a referendum on that matter, which was forwarded to the Board of Elections, approving the various numbers of signatures needed along with the identifying resolution. This was then forwarded back to the Cuyahoga Falls city Council, which must then vote to certify it as an election ballot issue.

It is this vote that the Plaintiffs seek to stop by this injunction from the Cuyahoga Falls City Council's ordering it on the ballot.

The Plaintiffs complained that if the referendum is to go forward in November, 1996, their financial backers will pullout, an once "off schedule," those sources of funds would not be available to them. It is for this reason that the Plaintiffs' request a preliminary injunction or permanent injunction to restrain and permit any further action related to the referendum proceedings being taken by Cuyahoga Falls city Council, and/or Gregg Wagner, in submitting that ordinance to the Summit County Board of Elections for either a special or general election.

In Section 2, Article 9, of the Cuyahoga Falls Charter, it states:

> "The electors shall have the power to approve or reject at the polls any ordinance or resolution passed by the council. .."

The citizens of the City of Cuyahoga Falls have reserved to themselves the right of referendum on any matter coming before the City Council which they choose. That provision has been interpreted to mean administrative or legislative matters.

since the Charter provision reserved the right of people to review by referendum matters considered by their city Council, this referendum is no different. See *City of Eastlake, et al. Petitioners, v. Forest City Enterprises, Inc.* at 426 U.S. 668, 96 Sup. Ct. 2358. For all of the above reasons, the Motion for Preliminary or Permanent Injunction of the Plaintiffs is hereby DENIED.

It is so ordered.

/s/ Judge James E. Murphy

cc: Attorney Virgil E. Arrington,
Attorney J. Drew McFarland
Attorney Edward G. Kramer
Prosecutor Maureen O'Connor

APPENDIX J

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

1. First Amendment to the United States Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. Section 1 of the Fourteenth Amendment to the United States Constitution.

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. 28 U.S.C. 1738.

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be

proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

4. 42 U.S.C. 3604.

"As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful -

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national

origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

(f)(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of -

(A) that buyer or renter,

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that buyer or renter.

(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of -

(A) that person; or

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that person.

(3) For purposes of this subsection, discrimination includes -

(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling; or

(C) in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after September 13, 1988, a failure to design and construct those dwellings in such a manner that -

(i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;

(ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

(iii) all premises within such dwellings contain the following features of adaptive design:

(I) an accessible route into and through the dwelling;

(II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(III) reinforcements in bathroom walls to allow later installation of grab bars; and

(IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

(4) Compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as ''ANSI A117.1'') suffices to satisfy the requirements of paragraph (3)(C)(iii).

(5)(A) If a State or unit of general local government has incorporated into its laws the requirements set forth in paragraph (3)(C), compliance with such laws shall be deemed to satisfy the requirements of that paragraph.

(B) A State or unit of general local government may review and approve newly constructed covered multifamily dwellings for the purpose of making determinations as to whether the design and construction requirements of paragraph (3)(C) are met.

(C) The Secretary shall encourage, but may not require, States and units of local government to include in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such

dwellings are consistent with paragraph (3)(C), and shall provide technical assistance to States and units of local government and other persons to implement the requirements of paragraph (3)(C).

(D) Nothing in this subchapter shall be construed to require the Secretary to review or approve the plans, designs or construction of all covered multifamily dwellings, to determine whether the design and construction of such dwellings are consistent with the requirements of paragraph 3(C).

(6)(A) Nothing in paragraph (5) shall be construed to affect the authority and responsibility of the Secretary or a State or local public agency certified pursuant to section 3610(f)(3) of this title to receive and process complaints or otherwise engage in enforcement activities under this subchapter.

(B) Determinations by a State or a unit of general local government under paragraphs (5)(A) and (B) shall not be conclusive in enforcement proceedings under this subchapter.

(7) As used in this subsection, the term ''covered multifamily dwellings'' means -

(A) buildings consisting of 4 or more units if such buildings have one or more elevators; and

(B) ground floor units in other buildings consisting of 4 or more units.

(8) Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or other jurisdiction in which this subchapter shall

be effective, that requires dwellings to be designed and constructed in a manner that affords handicapped persons greater access than is required by this subchapter.

(9) Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others."

5. Article IX, Section 2, Cuyahoga Falls Charter

The electors shall have the power to approve or reject at the polls any ordinance or resolution passed by the Council, except as hereinafter provided. Only electors of the City may circulate referendum petitions. Within thirty (30) days after the passage by the Council of such ordinance or resolution or its repassage over the Mayor's veto, whichever is later, a petition signed by at least ten percent (10%) of the electors of the City may be filed with the Clerk of the Council, requesting that such ordinance or resolution be either repealed or submitted to a vote of the electors. If said petition is signed by twenty percent (20%) or more of such electors, the date of the election may be fixed therein, not less than ninety (90) days from the time of filing thereof. When such petition is filed, the Clerk shall first ascertain the sufficiency of the petition, and if found sufficient, the Council shall thereupon, within thirty (30) days of the filing of such petition, reconsider such ordinance or resolution. If upon such reconsideration the ordinance or resolution is not repealed, the Council shall provide for submitting it to a vote of the electors on the date so fixed, or, if not so fixed, at the first general election in any year occurring more than ninety (90) days from the filing of such petition. No such ordinance or

resolution shall go into effect until approved by a majority of those voting thereon, in which event such ordinance or resolution shall go into effect on the fifth day after the day on which the Board of Elections certifies the official vote thereon. When the Council by general law or under provisions of general ordinance is required to pass more than one ordinance or resolution necessary to make and pay for any public improvement, the referendum provision shall apply only to the first ordinance or resolution required to be passed and not to any subsequent ordinances or resolution relating thereto.

In addition, ordinances providing for an annual tax levy or for improvements petitioned for by the owners of a majority of the foot front of the property benefited and to be specially assessed therefor, and appropriation ordinances limited to the subject of appropriations shall not be subject to referendum, but, except as herein provided, all other ordinances and resolutions necessary for the immediate preservation of the public peace, health or safety, including emergency ordinances and resolutions necessary for the immediate preservation of the public peace, health or safety, shall be subject to referendum, except that such emergency ordinances and resolutions shall go into effect at the time indicated therein. If, when submitted to a vote of the electors, an emergency measure be not approved by a majority of those voting thereon, it shall be considered repealed as regards any further action thereunder; but such measure shall be deemed sufficient authority for payment, in accordance therewith, of any expense incurred previous to the referendum vote thereon.

Ordinances or resolutions submitted to the Council by initiative petition and passed by the Council either with or without change, but not submitted to a vote of the electors shall be subject to referendum in the same manner as other ordinances or resolutions.

6. Cuyahoga Falls Ordinance 1144.04 Planning Commission Consideration.

The Commission shall consider the location of buildings, parking areas and other features with respect to the topography of the lot, existing natural features such as streams and large trees, the efficiency, adequacy and safety of the proposed layout of internal streets and driveways, the location of the green area provided, bearing in mind the possible effects of irregularly shaped lots, the adequacy, location, landscaping and screening of the parking lots and such other matters as the Commission may find to have a material bearing upon the stated standards and objectives of the various district regulations.

If the Commission finds that a proposed plan of development does not meet the purposes of this Zoning Ordinance, it shall disapprove the plan and shall submits its findings in writing, together with the reasons therefor, to the applicant, within sixty days after having received the site plan. If no action has been taken by the Commission within such time, then such plan shall be deemed to have been approved; provided, however, that the applicant may waive this time limit and consent to the extension of such period, in which event he shall give notice of the waiver to the Planning Commission.